The Scope of Liability for Product Defects under the South African Consumer Protection Act 68 of 2008 and Common Law - A Comparative Analysis

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SUMMARY

The South African Consumer Protection Act 68 of 2008 ('CPA') has introduced strict liability for harm caused by defective consumer goods. This represented a radical reform of South African product liability law, which had developed in the form of the fault-based Aquilian action. Section 61 of the CPA imposes strict liability on the producer, importer, distributor and retailer for harm resulting from unsafe goods, product failures, defects or hazards or inadequate instructions or warnings accompanying goods.

It is argued that a statutory strict liability regime requires comprehensive and logically coherent regulation which should, in the interest of legal certainty, remain as consistent as possible with the existing common law rules. The CPA's product liability framework gives rise to legal uncertainty in a number of respects.

The study comprises a comparative analysis the CPA's product liability framework with reference to its common law background and similar regimes in the USA, EU and Australia, identifying relevant principles, conclusions and rules to assist South African courts and practitioners in the interpretation and application of the product liability framework. Further, the study examines to what degree section 61 liability extends the scope of common law liability for harm caused by defective goods. Finally, the study investigates the likely practical impact of section 61 by reviewing judicial, semi-judicial or administrative handling of product liability claims in South Africa since introduction of the CPA compared to the experience in foreign jurisdictions.

The study undertakes applied comparative research, which involves critically evaluating the differences and similarities between the South African and foreign product liability frameworks and drawing conclusions on the theoretical and likely practical impact of strict product liability in South Africa. The efficacy of the CPA's product liability framework is measured against the following criteria: (i) the CPA's legislative purposes (ii) fairness in balancing competing interests of consumers and the supply chain (iii) legal certainty, and (iv) flexibility to adapt to a changing consumer marketplace and technological advancements.

It is argued that the legal uncertainty arising from aspects of the CPA's product liability framework can to an extent be remedied by way of purposive interpretation, in so far as this is permitted by principles of statutory interpretation, having regard to the legislative policy underpinning the CPA and, where appropriate, similar frameworks in foreign legal systems. Further, recommendations are made for legislative amendment.

The study concludes that introduction of strict product liability has been a significant step in the right direction in aligning South African consumer law with that of its international trading partners and will prompt higher levels of product safety generally. Further, it is likely that section 61 will increase the number of product liability claims due to the extended scope of liability and that the new judicial, semi-judicial and administrative bodies created under the CPA will deal with the vast majority of claims. However, it is the duty of the courts and legislature to provide these bodies with clearer guidelines on the interpretation of the CPA's product liability framework.

OPSOMMING

Die Wet op Verbruikersbeskerming 68 van 2008 ('CPA') het skuldlose aanspreeklikheid ingevoer vir skade veroorsaak deur defektiewe verbruikersgoedere. Dit behels 'n radikale regshervorming aangesien Suid-Afrikaanse produkaanspreeklikheid voorheen ontwikkel het in die vorm van die skuldgebaseerde Aquiliese aksie. Ingevolge artikel 61 van die CPA is

vervaardigers, invoerders, verspreiders en kleinhandelaars skuldloos aanspreeklik vir skade versoorsaak deur onveilige of defektiewe goedere, produkfalings en onvoldoende waarskuwings of instruksies verskaf saam met goedere.

Dit word geargumenteer dat ‘n statutêre raamwerk vir skuldlose aanspreeklikheid omvattende en logies samehangende regulering benodig, wat, ter wille van regsekerheid, so na moontlik eenvormig behoort te wees aan die bestaande gemeenregtelike raamwerk. Die CPA se raamwerk vir produkaanspreeklikheid bring in verskeie opsigte regsonsekerheid mee.

Die studie onderneem ‘n regsvergelykende analise van die CPA se raamwerk vir produkaanspreeklikheid met verwysing na die gemeenregtelike agtergrond en soortgelyke raamwerke in die VSA, EU en Australië, en identifiseer relevante beginsels, gevolgtrekkings en reëls as riglyne vir Suid-Afrikaanse howe en regspraktisyns by die interpretasie en toepassing van die raamwerk vir produkaanspreeklikheid. Die studie ondersoek ook die mate waarin artikel 61-aanspreeklikheid die omvang van gemeenregtelike aanspreeklikheid vir skade veroorsaak deur defektiewe produkte uitbrei. Ten slotte oorweeg die studie die waarskynlike praktiese impak van artikel 61 by wyse van hersiening van judisiële, semi-judisiële en administratiewe hantering van produkaanspreeklikheidseise in Suid-Afrika sedert inwerkingtrede van die CPA met vergelyking van die ervaring in ander regstelsels.

Die studie behels toegepaste, regsvergelykende navorsing, en in besonder ‘n kritiese analise van die ooreenkomste en verskille tussen die raamwerke vir produkaanspreeklikheid in Suid-Afrika en ander regstelsels, op grond waarvan gevolgtrekkings gemaak word rakende die teoretiese en waarskynlike praktiese impak van skuldlose produkaanspreeklikheid in Suid-Afrika. Die effektiwiteit van die CPA se raamwerk vir produkaanspreeklikheid word gemeet aan die volgende kriteria: (i) die CPA se wetgewende doelstellings; (ii) billikheid in die balansering van kompeterende belange van verbruikers en die voorsienersketting; (iii) regsekerheid; en (iv) buigsaamheid om aan te pas by ‘n veranderende verbruikersmark en tegnologiese ontwikkeling.

Die studie voer aan dat die regsonsekerheid wat onstaan uit aspekte van die CPA se raamwerk vir produkaanspreeklikheid in ‘n mate reggestel kan word deur ‘n doeldienende interpretasie van die raamwerk se bepalings sover die beginsels van statutêre interpretasie dit toelaat, met verwysing na die CPA se onderliggende doelstellings en waar gepas, soortgelyke raamwerke in ander regstelsels. Sekere wetswysigings word voorgestel.

Die studie se gevolgtrekking is dat invoering van skuldlose produkaanspreeklikheid ‘n belangrike stap was om Suid-Afrikaanse verbruikersreg in lyn te bring met dié van sy internasionale handelsvennote en sal lei tot ‘n algemene hoër standaard van produkveiligheid. ‘n Verder bevinding is dat die aantal produkaanspreeklikheidseise waarskynlik sal vermeerder weens die uitgebreide omvang van aanspreeklikheid, en dat die meerderheid van eise gehanteer sal word deur die nuwe judisiële, semi-judisiële en administratiewe liggame geskep deur die CPA. Dit is egter die plig van die howe en wetgewer om duideliker riglyne aan hierdie liggame te verskaf rakende die interpretasie van die CPA se raamwerk vir produkaanspreeklikheid.

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CHAPTER 1

INTRODUCTION AND RESEARCH AIMS

1.1 INTRODUCTION

On 31 March 2011, the *Consumer Protection Act 68 of 2008* ('**CPA'**) came into effect in South Africa. According to its Preamble, the CPA has been enacted for the purpose of, *inter alia*, promoting and protecting consumers' economic interests, protecting consumers from hazards to their well-being and safety and developing effective means of redress for consumers.

One way in which the CPA purports to achieve its legislative purpose is by introducing strict liability for the supply of defective consumer goods. **Section 61** of the CPA imposes strict liability for harm resulting from unsafe goods, a product failure, a defect or hazard in any goods, or harm caused due to inadequate instructions or warnings provided to the consumer.[1] Strict liability is joint and several and may be incurred by a South African producer, importer, distributor or retailer while the plaintiff need not establish negligence on the part of any of these suppliers.[2]

Prior to the introduction of the CPA, product liability in South Africa developed under the negligence-based law of delict. The introduction of a statutory strict liability regime requires comprehensive and logically coherent regulation which should, in the interest of legal certainty, remain as consistent with the existing common law framework as possible.[3]

[1] Section 61(1).
[2] Ibid.
[3] Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) *Stell LR* 17 at 417.

1.2 PROBLEM IDENTIFICATION AND RESEARCH AIMS

1.2.1 Scope of Liability: Different Actions and Concurrence

Section 2(10) of the CPA provides that:

> *"no provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law."*

Further, section 76(1) of the CPA deals with the powers of courts to enforce consumer rights under the CPA and provides as follows:

> *"In addition to any other order that it may make under this Act or any other law, a court considering a matter in terms of this Act may –*
>
> *(a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;*
>
> *(b) make any order specifically contemplated by this Act; and*
>
> *(c) award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act."*

It would appear from these provisions that the statutory remedies afforded by the CPA are intended to co-exist with common law remedies and cannot limit or restrict the scope of existing common law protection afforded to consumers. If this is the case, it follows that liability for damages for harm caused by defective goods may arise from breach of contract; and/or delict; and/or section 61 of the CPA, depending on which actions' legal requirements are met.

This study aims to establish **to what degree strict liability under section 61 of the CPA extends the scope of common law liability for consequential damages** for harm caused by product defects.

This study aims to present a **comparative analysis of section 61 and common law actions for consequential damages** arising from harm caused by product defects. The analysis identifies where common law and section 61 liability for consequential damages overlap and supplement each other's scope. The analysis is structured with reference to the respective actions' scope of application, elements or requirements and defences.

Drawing distinctions between legal remedies is of practical relevance where a claimant is presented with a choice of actions, in other words, where there is a concurrence of actions. For instance, a claimant would need to consider the legal requirements to succeed with each action, when the limitation period for each action commences and the type or scope of relief available under each action. For purposes of this study, concurrence of actions refers to concurrence in the 'true' or 'narrow' sense, which denotes:

- concurrence of actions in the same field or area of the law, in this case, the law of obligations;
- concurrence of actions which have a similar goal and consequences, in this case, the recovery of consequential damages for harm caused by defective goods; and
- concurrence of actions between the same persons, in this case, the consumer/user of the defective good and the supplier of the defective good.[4]

[4] Van Aswegen *Die Sameloop van Eise om Skadevergoeding uit Kontrakbreuk en Delik* (1991) 6-7 and authorities cited here; Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 63. For South African cases involving concurrence of actions in the narrow sense, see, for instance: *Van Wyk v Lewis* 1924 AD 438; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985* (1) SA 475 (A); *MEDIA 24 Ltd v Grob*ler 2005 (6) SA 328 (SCA); *SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 (4) SA

1.2.2 Scope of Liability: Interpretation of Section 61 of the CPA

Regrettably, the current formulation of the section 61-liability provisions creates legal uncertainty in a number of respects, particularly as regards the test or standard for *product defectiveness*, the *scope of goods* that are covered and the *extent of damages* recoverable. The strict liability provisions under the CPA incorporate concepts or definitions that are either confusing, redundant or nonsensical. This study aims to **interpret the strict product liability provisions under the CPA against their common law background and with reference to similar provisions in foreign legal systems** and to offer suggestions for legislative amendment.

The study argues that the interpretation and application of the CPA can be shaped by relevant and satisfactory principles, conclusions and rules that have already crystallised in Australia, EU and US law. Accordingly, the study aims to provide South African lawyers and Courts with **detailed and focussed comparative material to assist in the interpretation and application of section 61** of the CPA, in addition to existing South African literature regarding product liability.

The author has extensive practical experience in product liability litigation as a solicitor in the State of Victoria, Australia. Where possible, the study aims to provide useful, practical examples of the interpretation and application of federal and state strict product liability laws applicable in this jurisdiction.

1019 (SCA); *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C); *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA).

1.2.3 Impact of Wider Liability

Finally, this study aims to comment on / investigate the likely **practical impact of section 61** on litigated product liability claims in South Africa and the more general impact on industry with respect to management of product safety risk and consumer complaints. This is done by reviewing the South African experience in judicial, semi-judicial or administrative handling of product liability claims since introduction of the CPA and comparing this with the experience and trends in foreign legal systems where strict product liability has applied for a number of decades.

1.3 BACKGROUND TO RESEARCH TOPIC

1.3.1 Strict product liability: A Global phenomenon

A comparative study conducted in 2003 to assess the degree of uniformity among various countries' product liability regimes, recorded a broad trend worldwide toward greater consumer protection.[5] The importance of this agenda in many jurisdictions is reflected in the creation of a special product liability regime, i.e. an area of law with principles and rules differing from general tort or contract.[6] The clear majority of countries examined in which product liability is recognised as a distinct field, have codified the core elements of the subject through special legislation, either in the form of a separate product liability act, as a section in a more comprehensive consumer protection act, or a set of special product liability rules included in the torts chapter of a civil code.[7]

[5] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *AmJCompL* 51 at 751, 759.
[6] 760.
[7] 761.

In the early 1960's, the principle of strict liability in tort for harm caused by a product defect emerged for the first time from a series of judgments in the United States.[8] In one of the landmark decisions, *Greenman v Yuba Power Products Inc,*[9] the Supreme Court of California imposed a general, strict liability upon the manufacturer in tort even though the case was in fact brought as a claim for breach of warranty. The Court acknowledged that:

> "*although strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."*[10]

In 1965, the American Law Institute subsequently published the *Restatement (Second) of Torts,*[11] containing in section 402A a model version of strict tort liability, which was adopted by the majority of American jurisdictions at the time.[12] This faultless liability was based on the central notion of a product reaching the consumer "in a defective condition unreasonably dangerous."[13]

In a comment to section 402A, the *Restatement (Second)* introduced a test for product defectiveness, stating that *"the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics*". This formulation

[8] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 596.
[9] 377 P 2d 897 (1963)
[10] 901 (Traynor J).
[11] (1965).
[12] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 598.
[13] Section 402A(1) *Restatement (Second) of Torts*.

was used by many American courts as the basis for applying what came to be known as the 'consumer expectations test.'[14]

Furthermore, particularly in the context of design defects, courts developed a 'risk-utility defence', comprising of a weighing of the costs and benefits of product innovation on society. Section 402A in its first form essentially represented a strict liability regime, tempered with negligence elements and extensive provision for defences.

With the introduction of the *Restatement (Third) of Torts* in 1998, section 402A was replaced by a new formulation of liability which differentiates between manufacturing defects, design defects and products which are defective due to inadequate instructions or warnings. Pursuant to section 1 of the Restatement, "*one who is engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect".* Under section 2(a) to (c) liability is set out separately for each type of defect. Whereas manufacturing defects are subject to strict liability, a comment to section 1 of the Restatement acknowledges that this not suitable for design defects and failures to warn, therefore the law returns to "*a reasonableness test traditionally used in determining whether an actor has been negligent.*"

This re-introduction of negligence elements in United States product liability signifies changing policy. Whereas initially, consumer protection was the main driving force for the imposition of strict liability, the American regime has become noticeably more conservative

[14] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *AmJCompL* 51 at 713.

over the last two decades, seemingly in an effort to increase industry protection against allegedly overblown liability rules.[15]

In Europe, extensive law reform debates during the 1970's culminated in the adoption by the EEC Council of a *Directive on Product Liability*[16] ('the EU Directive) in 1985. The EU Directive introduced strict product liability to the European Community, a move which was driven in part by public demands in the aftermath of the Thalidomide tragedy, as well as, albeit to a lesser extent, pressure for harmonization of laws within the EEC.[17]

In terms of article 1, a producer is liable for damage caused by a defect in his product. A product will be considered defective under the EU Directive, "*when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put and the time when the product was put into circulation."*[18] On face value, the EU Directive employs a 'consumer expectations test' for determining product defectiveness. However, a closer look at the circumstances to be taken into account under article 1, such as the 'reasonably' expected use and time it was put into circulation, also reveals elements resembling a 'risk-utility' approach.[19]

It is argued that consideration of these factors reintroduces elements of negligence to the enquiry.[20] For example, what could reasonably be expected in the context of product use is essentially a question of foreseeability, which arguably reintroduces the concept of

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15 Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 600.
16 (85/374/EEC).
17 Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *AmJCompL* 51 at 502.
18 Article 6(1).
19 Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 601.
20 Wedderburn 'The Consumer Protection Act 1987' (1987) 50 *Modern Law Review* 614, 617.

reasonable care.[21] Furthermore, the inclusion of a "development risks defence" in the EU Directive,[22] which allows the producer to escape liability by proving that the state of knowledge at that time "was not such as to enable the existence of the defect to be discovered", diminishes the purported 'strictness' of the liability. If this defence is interpreted to mean that the person has merely to prove that reasonable care was exercised, then liability is no longer being imposed for foreseeable, and unforeseeable risks and consequently is not strict.[23]

Application of a "consumer expectations test" has presented difficulties in foreign jurisdictions. It has been extensively criticised in literature mainly because it fails to "*provide the interpreter with an objective standard against which the safety of a product can be assessed*."[24] It has been described as "*impenetrable to analysis*", given that people routinely miscalculate risks; therefore, a legal standard cannot coherently or fairly be based on such a volatile standard.[25]

Nevertheless, the framework provided by the EU Directive, which has been implemented by all EU member states in their respective national legal systems, has also served as a model for strict product liability regimes in countries across Eastern Europe, the Far East and Latin America.[26] South Africa is no exception, with much of the product liability provisions of the CPA closely following the wording of the EU Directive and the corresponding product liability section of the *UK Consumer Protection Act 1987*, which

[21] Wedderburn 'The Consumer Protection Act 1987' (1987) 50 *Modern Law Review* 614, 617.
[22] Article 7(e) of the Directive gives Member States the option of including this defence.
[23] Stapleton 'Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective' (2000) *Washburn LJ,* 39 at 363, 369.
[24] Clark 'The Conceptual Basis of Product Liability' (1985) *Modern Law Review*, 48 at 325.
[25] Stapleton 'Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective' (2000) *Washburn Law Journal* 39 at 376, 377.
[26] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *AmJCompL* 51 at 761.

implements the EU Directive.[27] The alternative approach to this, being a risk-utility analysis, seems to be dominant in the United States, although American Courts have often combined this approach with a consumer expectations test.[28]

Regardless of which test is adopted to establish product defectiveness, it is clear that foreign strict product liability regimes are not absolutely strict. Reintroduction or retention of negligence elements as mentioned above, whether done overtly like the *US Restatement* or more subtly like the EU Directive, raises the question whether the CPA, which closely follows the EU Directive model, has truly introduced product liability worthy of being labelled "strict".

1.3.2 The Policy Underlying Strict Product Liability

The initial move towards strict product liability in tort, as it emerged from American case law in the 1960's, was supported by a number of policy considerations based on notions of fairness and economic efficiency. In one of the landmark US product liability decisions, *Greenman v Yuba Power Products Inc,*[29] Justice Traynor stressed that manufacturers are best placed to absorb the risks of injury and to spread the costs, either by means of insurance or by adjusting the prices of their products. This links in with the utilitarian or efficiency-based argument in favour of strict liability, namely that:

> *"the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur..."*[30]

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[27] Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) *Stell LR* 17 at 413.
[28] 769.
[29] 377 P2d 897 (1963) 901 (Traynor J).
[30] *Henningsen v Bloomfield Motors Inc* 161 A 2d 69 (1960) 81.

It is argued that shifting or allocating the risk of loss to the 'deep pocket' manufacturer is economically and morally justified given that the loss could be catastrophic to the individual consumer.[31]

Given that the ultimate consumer or end user of a product is rarely able to fully analyse a product's safety and therefore necessarily trusts that it will not be hazardous, it is in the general interest of public protection that the manufacturer bear the risk of injury.[32]

Furthermore, requiring plaintiffs who were clearly harmed by defective products to prove negligence on the part of the manufacturer in many cases presents an insurmountable obstacle to obtaining redress. It was reasoned that strict liability would assist plaintiffs in circumstances where proof of negligence and establishing causation would be difficult or impossible.

It was further reasoned by American courts that strict liability would lead to increased product safety given that manufacturers, faced with the risk of strict liability, would take additional precautions at the various stages of the production process.[33] In other words, strict liability would provide an incentive for collective investment in improved product safety.

The rationale for strict product liability as a means of increasing consumer protection can also be supported by an argument based in behavioural economics, namely that consumers or product users systematically make judgement errors and suboptimal

[31] Stapleton 'Product Liability (1994) 93-94.
[32] *Jacob E. Decker & Sons v Capps* 164 SW 2d 828, 829 (1942).
[33] *Philips v Kimwood Machine Co*, 525 P 2d 1033, 1041-2 (1974). This view is also put forth in an explanatory comment on the *Restatement (Third) on Torts: Product Liability*, which states that a strict liability regime creates stronger safety incentives than a fault-based system, under which sellers may in some cases escape liability for their harmful products.

decisions when assessing product risks and using products. Behavioural economics, a field which "*combines cognitive psychology and experimental economics in its empirical approach to human decision making*", has impacted significantly on legal theory in the last two decades.[34] While an in depth discussion of this field is beyond the scope of this study, it is necessary to provide a brief overview of some of the key cognitive biases and heuristics identified in this field that seek to explain or predict how consumers make decisions.

The concept of 'bounded rationality' refers to cognitive biases such as judgement errors and biased perceptions, which depart from the so-called 'rational choice theory' in economics. In short, it recognises that persons take certain shortcuts in their reasoning that could lead to suboptimal decision-making. The leading theoretical formulation of bounded rationality is 'Prospect Theory',[35] which puts forward the following key insights:[36]

- Decisions are made based on a reference point. In other words, persons would not measure total welfare levels, rather relative changes in the status quo.
- When persons consider whether to risk a loss for the chance of a gain, the potential losses are weighted more heavily than the potential gains.
- Persons are risk averse when choosing between gains and risk seeking between losses.
- Persons tend to under-weigh large probabilities and overweigh small probabilities.

[34] Hacker 'More behavioural vs more economic approach: explaining the behavioral divide between the United States and the European Union' (2016) Hastings Int'l & Comp. L. Rev. 39 at 359.
[35] Kahnemann & Tversky 'Prospect theory, an analysis of decision under risk' (1979) Econometrica 47 at 263.
[36] Hacker 'More behavioural vs more economic approach: explaining the behavioral divide between the United States and the European Union' (2016) Hastings Int'l & Comp. L. Rev. 39: at 360.

Other relevant decision-making biases identified under bounded rationality theory include optimism bias, confirmation bias and the availability heuristic.[37] Optimism bias refers to a cognitive bias whereby persons believe they are less exposed to the risk of a negative event happening to them compared to others.[38] Confirmation bias refers to a cognitive bias which causes a person to search for, interpret, favour and remember information in a way that confirms that person's existing beliefs or views, while giving relatively less consideration to alternative possibilities.[39] The availability heuristic refers to a mental shortcut whereby a person relies on immediate examples that come to the person's mind when assessing a certain topic or decision, which may lead to a tendency to base decisions heavily on more recent information.[40]

The concept of 'bounded willpower' refers to the incapacity of persons to adhere to their own plans.[41] At the moment of decision-making, persons often exhibit what is referred to as a 'present bias' which causes persons to act in favour of immediate gratification rather than longer term maximisation.[42]

The notion of 'bounded self-interest' refers to a departure from the assumption that persons' economic behaviour is only driven by self-interest.[43] Experimental economic studies have shown that persons are also driven by 'other-regarding' norms such as fairness and would make monetary sacrifices in order to enforce those norms.[44]

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37 Ibid.
38 O'Sullivan 'The neural basis of always looking on the bright side' Dialogues in Philosophy, Mental and Neuro Sciences 8(1) at 12.
39 Plous *The Psychology of Judgment and Decision Making* (1993) 223.
40 Esgate & Groome *An Introduction to Applied Cognitive Psychology* (2005) 201.
41 Sunstein *Behavioural Law and Economics* (2000) 15.
42 Hacker 'More behavioural vs more economic approach: explaining the behavioral divide between the United States and the European Union' (2016) Hastings Int'l & Comp. L. Rev. 39 at 361.
43 Sunstein *Behavioural Law and Economics* (2000) 16.
44 Hacker 'More behavioural vs more economic approach: explaining the behavioral divide between the United States and the European Union' (2016) Hastings Int'l & Comp. L. Rev. 39 at 361.

The concept of 'cognitive capacity limits' recognise that persons have limited capacity to process any amount of information in a given time and not all information persons are confronted with will enter their working memory.[45] According to this concept, when all cognitive channels of information processing are used, any further information results in information overload, which leads to a marked deterioration in the quality of a person's decisions.[46] Further, limited working memory can also be linked to persons' limited capacity to pay attention to everything around them. It is also recognised that persons often have unlimited faith in their attention capabilities, creating an illusion of attentiveness and control.[47]

In the context of product liability and consumer protection, the question is whether these cognitive biases and heuristics are more likely to cause consumers to accurately estimate, over-estimate, or under-estimate the safety or risks posed by products. If consumers systematically underestimate product risks, then product safety levels produced by an unregulated market cannot be trusted to reflect desired levels of investment in product risk reduction. In other words, the law has to intervene to ensure that consumers are adequately protected against themselves.

While consumer decision-making biases and heuristics are relevant in analysing the efficacy of any consumer protection instrument, their use in the analysis ought to be qualified. It is argued that importing the identified biases and cognitive limits into legal analysis requires a further level of justification given the intrinsic uncertainty of the results

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45 361-362.

46 Eppler & Mengis 'The Concept of Information Overload: A review of literature from organisation science, accounting, marketing MIS and related disciplines' (2004) Info. Soc'y 325,326; Edmunds & Morris 'The Problem of Information Overload in Business Organizations: a review of literature' (2000) International Journal of Information Management 20 at 17, 19.

47 Chabris & Simons *The Invisible Gorilla: And other ways our intuition deceives us* (2010) 7.

of empirical studies.[48] The reason for this is that almost every empirical study showing a bias in one direction can be opposed by a study that found a bias to the contrary.[49] Further, it is uncertain how the many biases and heuristics would interact which means it is often very difficult or impossible to predict how persons would be biased in a particular case and if so, in what way.[50]

The spread of strict product liability around the world was indicative of a general move towards greater consumer protection. However, in the eighties and nineties, the United States began to experience mounting pressure to increase industry protection.[51] Courts began to take a more restrictive view on manufacturers' liability and moved away from high damages awards of their own accord.[52]

A number of arguments for abandoning strict product liability and returning to a type of modified or 'stricter' negligence standard have been raised in literature.[53] For instance, it is questioned whether manufacturers are truly best positioned in all cases to assess the risks of their products. Some risks simply cannot be avoided, which is often the case with latent design defects. It follows that, if a manufacturer knows he will be held strictly liable for any harm caused by his product, he may be inclined to take excessive precautions and load prices to such an extent that he is forced out of the market or discouraged from developing

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48 Hacker 'More behavioural vs more economic approach: explaining the behavioral divide between the United States and the European Union' (2016) Hastings Int'l & Comp. L. Rev. 39: at 363, citing Rizzo & Whitman 'The knowledge problem of New Paternalism' (2009) BYU L. Rev. 905; Klass & Zeiler 'Against endowment theory: experimental economics and legal scholarship' (2013) UCLA L. Rev. 2 at 61; Schwartz 'Regulating for Rationality' (2015) Stan. L. Rev. 67 at 1373.

49 363, citing Rizzo & Whitman 'The knowledge problem of New Paternalism' (2009) BYU L. Rev. at 951-955.

50 364.

51 Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *AmJCompL* 51 at 760.

52 Markesinis & Deakin *Markesinis and Deakin's Tort Law* (2012) 606.

53 606-607.

new products.[54] In other words, strict product liability may not only stifle innovation but result in reduced access to consumer goods. In the South African context, overregulation of certain consumer goods may prevent a large proportion of disadvantaged consumers from accessing those goods.

It is further argued that, from an insurance perspective, manufacturers are not always best positioned to evaluate specific risks and take out the appropriate insurance cover for those risks.[55] For instance, in the case of property damage, the consumer who owns that property has more information regarding the value and use of the property to enable him to take out appropriate insurance cover for that property. Strict product liability would require manufacturers to take out third party liability insurance while household property would often be covered by first party insurance, which leads to an unnecessary and wasteful double insurance of the property damage loss.[56] This criticism is however limited to the case of property damage and in practice, the first party insurer can often recover an amount paid out by it from the manufacturer's liability insurer by way of a subrogated claim where it is established that the property damage was caused by a product defect.

Despite these criticisms, the policy considerations and arguments in support of strict product liability provide a strong justification for the imposition of such liability, reflected in the fact that so many jurisdictions around the world have adopted it in one form or another.

[54] Hodges 'Development risks: unanswered questions' (1998) 61 MLR 560.
[55] Markesinis & Deakin *Markesinis and Deakin's Tort Law* (2012) 606-607.
[56] 607.

1.3.3 The Move Towards Strict Product Liability in South Africa

In 2003 the Supreme Court of Appeal in *Wagener & Cuttings v Pharmacare Ltd,*[57] a case involving a defective batch of a pharmaceutical product, confirmed the application of the fault-based product liability principles as developed under the law of delict. Notwithstanding the court's conclusion that the manufacturer had wrongfully caused harm by selling the defective products, it declined to hold the manufacturer liable without proof of fault. Once again, the difficulty of proving negligence in the manufacturing of complex products such as pharmaceuticals was evident.

The plaintiffs argued that South African law had reached a stage where product liability should be developed in line with the strict liability regimes prevailing in American and European jurisdictions. The court carefully considered the arguments presented in favour of developing the common law. However, following the failure of the appellants to demonstrate the case for strict liability based on suggested inadequacy of the Aquilian remedy,[58] the Court concluded:

> *"as to the argument that strict liability had to be imposed for commercial reasons, that it was preferable that this should be done by way of legislation after due Parliamentary process and investigation so as to produce a comprehensive set of principles, rules and procedure. Single instances of litigation could not possibly provide for the depth and breadth of investigation, analysis and determination necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability."*[59]

[57] 2003 4 SA 285 (SCA).
[58] Par 24.
[59] Par 26, 37.

The Court voiced its concern regarding judicial law-making in this complex field by listing a number of important aspects pertaining to a strict product liability system which would have to be addressed by the Legislature, a body far more equipped to do so, including:

> *"1. What products should be included (or perhaps it is easier to specify what should be excluded) when it comes to determining the extent of the liability?*
>
> *2. Is a manufacturer to include X, the maker of a component that is part of the whole article manufactured by Y; and which is liable if the component is defective?*
>
> *3. Does defect mean defect in the making process only or, in the case of a designed article, also a defect of design? Should it include the failure, adequately or at all, to warn of possible harmful results?*
>
> *4. Should the liability be confined to products intended for marketing without inspection or extend even to cases where the manufacturer does, or is legally obliged to, exercise strict quality control?*
>
> *5. What relevance should the packaging have - should liability, for example, be limited to cases where the packaging precludes intermediate examination or extend to cases where the manufacturer stipulates that a right such as a guarantee would be forfeited if intermediate examination were made?*
>
> *6. Is a product defective if used innocuously on its own, but which causes damage when used in combination with another's product?*
>
> *7. What defences should be available?"*[60]

Following the *Wagener*[61] judgment, it was clear that the time had indeed come for product liability reform in South Africa. In addition to the general arguments in favour of strict product liability relating to economic efficiency, fairness, and collective investment in

[60] [35].
[61] *Wagener & Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA).

product safety, discussed above in 1.3.2, further arguments in the particular context of South Africa included the following:[62]

- The sophisticated state of the South African manufacturing industry justifies the imposition of strict liability for defective products, regardless of whether a contractual relationship exists between the consumer and the manufacturer.

- Manufacturers who produce and circulate potentially harmful products on a large scale via intermediaries such as distributors and retailers, are not held strictly liable, whereas individual craftspeople who produce limited amounts of goods are held strictly liable.

- The fact that the vast majority of South African manufacturers do not sell directly to the public means that the strict liability of manufacturers for consequential damages due to latent product defects, as developed at common law in *Kroonstad v Westelike Boere Ko-operatiewe Vereniging Bpk v Botha & Anor,*[63] would not be available to many consumers.

- Increasing commercial pressure from South Africa's global trading partners, who have introduced strict product liability, to align with international product liability trends.

Finally, it was argued that notions of fairness and justice, which are emphasised by the Constitution of South Africa, may form the basis for the development of "*new boni mores to assist the development of the common law to protect vulnerable consumers against dangerous or defective products, by imposing strict liability on manufacturers for consequential damages irrespective of privity of contract.*"[64]

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62 McQuoid-Mason *Consumer Law in South Africa* (1997) 108-110.
63 1964 (3) SA 561 (A).
64 McQuoid-Mason *Consumer Law in South Africa* (1997) 109.

These policy considerations and arguments ultimately became the driving forces for the introduction of strict product liability in South Africa.

1.4 METHODOLOGY

1.4.1 Applied comparative research

This study is conducted by way of applied comparative research, which involves (a) critically evaluating the differences and similarities between the South African and foreign strict product liability frameworks and (b) drawing objective conclusions with respect to the theoretical and likely practical impact of strict product liability in South Africa.

When conducting comparative research, it is important to remain cognisant of the fundamental differences between legal systems, such as the economic and political policy considerations that have shaped legislative regimes in those jurisdictions and foreign courts' approach to statutory interpretation and judicial law-making. It may not always be as simple as merely transplanting concepts and developments in foreign jurisdictions into South African law. However, comparative research nevertheless provides valuable guidance to South African courts in the interpretation of a new statutory regime, particularly where that regime creates legal uncertainty in some respects and foreign jurisdictions have decades of experience in applying similar regimes, as is the case with strict product liability.

Given that the South African legal system has elements of both the Roman/Germanic/civil law systems and Anglo/American or common law systems, comparative research involving systems from both legal families would be useful in gaining a better understanding of the

strict product liability regime introduced by the CPA and would contribute to a sensible development of South African product liability law.

The study examines strict product liability in Australia and the US, as representative of the approach followed in common law legal systems. Examination of strict product liability in civil legal systems focuses on the EU Directive[65] and the national laws of selected EU member states that have implementing the EU Directive, in particular, the United Kingdom and Germany. The United Kingdom, being a common law legal system bound to implement the EU Directive, serves as a unique comparator.[66]

The comparative legal material provided throughout the study is supplemented with practical examples drawn from the author's own experience. As noted above, the author has extensive practical experience in product liability litigation as a solicitor in the State of Victoria, Australia.

1.4.2 Theories of statutory interpretation

The analysis of the strict liability provisions under the CPA requires an understanding of the established principles or theories of statutory interpretation in South Africa. Whilst a comprehensive review of these theories is beyond the scope of this study, it is necessary to briefly reference the main theories of statutory interpretation recognised and the main approaches to statutory interpretation followed by South African courts. Importantly, the principles of statutory interpretation also provide guidance as to when it would be appropriate to consider comparative research and the limitations of using foreign comparators to inform South African legislative instruments.

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65 85/374/EEC.

66 As at the date of submission of this dissertation, the United Kingdom's decision to exit the European Union has not had any effect on the United Kingdom's obligations in respect of the EU Directive.

According to the literalist approach, the focus in determining the legislature's intention ought to be primarily on the literal meaning of the provision.[67] The primary rule of interpretation is that, if the plain meaning of the wording is clear, that meaning should be equated to the legislature's intention and should be given effect to ('the plain meaning approach').[68] If the plain meaning of the wording is ambiguous, vague or misleading, or if a strict literal interpretation would result in absurd results, then courts may deviate from the literal meaning to avoid an absurdity ('the golden rule').[69] As noted by Innes J in his classic formulation of the golden rule in *Venter v R,*[70] "*the context and such other considerations as the Court is justified to take into account"* may warrant deviation from the literal meaning of a legislative provision. Arguably, the judge's reference to *"such other considerations*" may include reference to comparative research to provide guidance as to the sensible interpretation of a provision and the likely intention of the legislature, however, this would admittedly be a last resort under a strict literalist approach. It is worth noting that courts have been slow to find that legislative provisions are 'absurd'.[71]

A pure literalist approach leaves very little room for judicial law making as courts are seen as merely mechanical interpreters of legislative provisions, to the exclusion of consideration of other aspects which may assist in clarifying the intention of the legislature.[72] Despite these criticisms, the majority of courts still follow the 'plain meaning'

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67 Du Plessis *Re-interpretation of Statutes* (2002) 93; 102.
68 103-4 and various authorities cited there.
69 The classic formulation of this rule is found in *Venter v R* 1907 TS 910 914-915 and has been repeatedly confirmed by courts subsequently.
70 *Venter v R* 1907 TS 910.
71 Du Plessis *Re-interpretation of Statutes* (2002) 104 citing for example: *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd* 1962 1 SA 458 (A); *Bolo v Royal Insurance Co of SA Ltd* 1969 3 SA 102 (E); *Sobukwe v Minister of Justice* 1972 1 SA 693 (A).
72 Du Plessis *Re-interpretation of Statutes* (2002) 93; 103-105.

approach. In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd*[73] the court held that, while the intention of the legislature is the primary rule of interpretation,

> *"…it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it."*[74]

According to the purposive approach, the purpose or object of the legislation is the prevailing factor in the interpretive process.[75] The approach allows for the context of the legislation, including socio-economic factors and underlying policy, to be taken into account in determining the purpose of the legislation. [76] The purposive approach incorporates the so-called 'mischief rule' according to which the purpose of legislation is to suppress mischief. This rule requires courts to consider four questions:

- What was the common law position prior to the legislation?
- What mischief or defect was not provided for by the common law?
- What remedy has the legislature chosen to address the mischief or defect not addressed by the common law?
- What is the true reason for the remedy provided by the legislation?[77]

Closely linked to purposivism is contextualism, pursuant to which it is argued that the purpose of a provision can only be determined by looking at it in context.[78] In *University of*

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[73] 1990 (1) SA

[74] At 944A. See also *Swanepoel v Johannesburg City Council, President Insurance Company Limited v Kruger*[1994] ZASCA 80; 1994 (3) SA 789 (AD) at 6 where the court again expressed support for the literal approach, stating that: "…*these rules of statutory exegesis are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication, the assistance of these rules need not be sought."*

[75] Du Plessis *Re-interpretation of Statutes* (2002) 96.

[76] 115.

[77] *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) 852-853; De Ville *Constitutional and Statutory Interpretation* (2000) at 247.

[78] Du Plessis *Re-interpretation of Statutes* (2002) 97.

Cape Town v Cape Town Bar Council,[79] Rabie CJ held that the court has to examine all the contextual factors in determining the legislature's intention, irrespective of whether or not the words are clear and unambiguous.[80] Relevant contextual factors may include looking at the language of the entire provision and the entire statute, as well as the statute's matter, its apparent purpose and scope and its background.[81] The purposive approach arguably provides greater scope for courts to seek guidance from comparative research in order to give context to the remedy chosen by the South African legislature to address the mischief and the true reason for that remedy, especially where a very similar remedy has been enacted in a foreign jurisdiction. However, as noted above at 1.4.1, comparative research should be treated carefully as foreign law is a product of policy considerations and legal traditions peculiar to that foreign jurisdiction and may be misleading when applied without qualification in the South African context.

The purposive approach allows courts to modify or adapt the initial meaning of the legislative text to harmonise it with the purpose of the legislation.[82] In other words, the role of the courts is more flexible and they are not merely mechanical interpreters of the legislation.

Although case law shows that South African courts' approaches to statutory interpretation vary from a narrow, literalist approach to broader purposivism, depending on the facts of the case and the legislation under consideration, the prevailing judicial approach to statutory interpretation in South Africa appears to be what is termed the 'literalist-cum-

[79] [1986] ZASCA 86.
[80] At 18.
[81] *Jaga v Dönges; Bhana v Dönges*, NO & Another 1950 (4) SA 653 at 662G-H; *S v Nel* 1987 4 SA 276 (O) 290F-J.
[82] Du Plessis *Re-interpretation of Statutes* (2002) 97.

intentionalist' approach.[83] According to this approach, the true aim of statutory interpretation is to ascertain the intention of the legislature and that the legislature meant to express its intention in the language of the provision. It is considered that the intention of the legislature can be determined by interpreting the language of a provision and that the "*words must be attributed their ordinary, literal, grammatical meaning*."[84]

While the purposive approach is recognised by courts as an accepted method of statutory interpretation, courts have made it clear that it is only appropriate where the language used in the provision lets the interpreter down,[85] in other words, where it is unclear or ambiguous. In *Standard Bank Investment Corporation v Competition Commission and Others, Liberty Life Association of Africa Ltd v Competition Commission and Others*[86] the majority of the Supreme Court of Appeal did not reject the purposive method of interpretation, but held that it was not necessary in the particular case given that the language of the relevant statutory provision was clear.

As discussed later in this study, the CPA contains a number of interpretation provisions suggestive of a purposive approach.[87] These provisions should be considered in light of the prevailing approaches taken by South African courts to statutory interpretation discussed in this section.

[83] 106-107.
[84] *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 1 SA 98 (SCA) 107A-B.
[85] Goldberg v P J Joubert Ltd 1960 1 SA 521 (T) 523D.
[86] [2000] ZASCA 20; 2000 (2) SA 797 (SCA).
[87] See 4.1.2 below.

1.4.3 Criteria for evaluating efficacy of the CPA's strict product liability framework

In light of the policy considerations underlying consumer protection instruments and strict product liability in particular, as discussed above at 1.3.2 and 1.3.3, this study evaluates the efficacy of the strict product liability framework introduced by the CPA against the following criteria:

- Does the framework achieve the underlying **legislative purposes** of the CPA including the promotion of consumer protection and consumer access to redress?
    - Does the framework assist plaintiffs in obtaining redress by alleviating the burden of proof in establishing liability against manufacturers and suppliers of defective products?
    - In defining the standard for product defectiveness, does the framework properly take into account the cognitive biases and heuristics of consumers when choosing products, interpreting instructions/warnings and forming expectations regarding a product's safety. For instance, does the framework take into account the effects of bounded rationality and cognitive capacity limits on the efficacy of mandatory product warnings and disclosures?
    - Is the framework likely to result in a greater collective investment by the supply chain in product safety? In other words, will the framework create a general incentive to the supply chain to review and improve its manufacturing and quality control processes so as to increase overall product safety levels?

- Does section 61 strike a **fair balance between competing interests** of consumers and the supply chain?
    - In answering this question, the policy directive of increasing consumer protection must be weighed up against the potential effects of overregulation, such as stifling

of innovation and overinvestment in safety, resulting in reduced consumer access to certain goods.

- Does the framework provide for a fair apportionment of liability between manufacturers and non-manufacturing suppliers, such as retailers or distributors, of defective products?

- Does the framework provide adequate **legal certainty** to consumers, the supply chain and courts?
  - Applying the prevailing theories of statutory interpretation in South Africa, does the framework provide sufficient clarity as to all of its key elements, such as the scope of goods covered, potential claimants and defendants, when goods are considered defective, the type of harm covered, the defences available and what damages are recoverable?

- Does the framework provide adequate **flexibility** to adapt to the ever-changing consumer marketplace and technological advancements resulting in new products, new ways of transacting and increased access to information?

CHAPTER 2
COMMON LAW LIABILITY FOR PRODUCT DEFECTS

2.1 INTRODUCTION

At common law, harm caused by a product defect may give rise to various causes of action. Depending on the particular facts of the case, a plaintiff may be able to recover contractual or delictual damages against a supplier of a defective product, claim replacement or repair of the product or a reduction in purchase price. In some instances, the facts may give rise to a concurrence of common law actions, providing the plaintiff with a choice of remedy.

The aim of this chapter is to provide an outline of the scope of common law liability for damages in South Africa, focussed specifically on harm caused by product defects. It is beyond the scope of this study to provide a comprehensive review of the relevant common law remedies and their development. Rather, this chapter concentrates on particular elements of common law liability for product defects which are important for the future interpretation and application of section 61 of the CPA and its implications for consequential damages claims. The outline serves as a necessary background for purposes of analysing section 61 later in this study.

This chapter aims to offer a more detailed, focussed common law background on product liability in South Africa for the specific purpose of analysing section 61, in addition to existing South African literature regarding product liability in general.

2.2 CONTRACTUAL LIABILITY FOR PRODUCT DEFECTS

At common law, contractual liability for the sale of a defective product generally arises on the basis of:

- breach of a warranty (express or implied warranty) that the product is sold free from defects,[88] or
- misrepresentation by the seller that the product is free from defects.[89]

The defect may relate to the quality of the product, the manufacturing process or design of the product, the absence of sufficient warnings as to dangerous features of the product or inadequate instructions as to safe and proper use.[90] It is of course possible that a product may simultaneously have more than one of these deficiencies, for instance, an unsafe design feature coupled with inadequate safety warnings or instructions to consumers regarding that design feature.

The scope of contractual remedies for product defects is limited by the doctrine of privity of contract. The law of contract will only aid the purchaser who stands in a direct contractual relationship with the seller of the defective product, whether it be a retailer, distributor, importer or the manufacturer of the product.[91] This effectively excludes third parties or innocent bystanders harmed by the defective goods, for instance, a donee or a member of the purchaser's household.[92]

Theoretically, there are mechanisms by which breach of warranty may be extended beyond its usual scope of application. For example, the rules of agency or the *stipulatio alteri* (agreement for the benefit of a third party) may permit the inference that a manufacturer provided a warranty to the ultimate consumer through the distributor or

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88 Glover *Kerr's Law of Sale and Lease* (2014) 195; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 78.
89 Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014); Loubser & Reid *Product Liability in South Africa* (2012) 23.
90 Van Niekerk & Schulze *The South African Law of International Trade: Selected Topics* (2006) 116.
91 Christie & Bradfield *Christie's The Law of Contract in South Africa* (2011) 269.
92 Van Eeden *Consumer Protection Law in South Africa* (2013) 367; Loubser & Reid *Product Liability in South Africa* (2012) 23-24.

retailer, resulting in a contractual relationship between the manufacturer and consumer.[93] However, it should be noted that in practice, these mechanisms are generally of limited value to the consumer given that the manufacturer generally determines the scope of the warranty it offers with its product.[94]

Where the person harmed by a product defect stood in a direct contractual relationship with the supplier of the product, the common law generally provides the following remedies:

- an action in contract for breach of an express or implied warranty;[95]
- an action in delict for pre-contractual misrepresentation;[96]
- aedilitian actions for the existence of a latent defect in the product or the seller's false pre-contractual statements bearing on the quality of the product.[97]

2.2.1 Breach of Contract

2.2.1.1 Express warranties

Where the parties to a contract of sale expressly agree that the product being sold shall possess certain qualities, whether relating to quality, function, durability or other attributes, the contract contains an express warranty.[98] The seller may also make representations

[93] Loubser & Reid *Product Liability in South Africa* (2012) 24.
[94] 23.
[95] Glover *Kerr's Law of Sale and Lease* (2014) 195; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 78.
[96] Bradfield *The Law of Contract in South Africa* (2016) 341; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 122; Bradfield *Christie's The Law of Contract in South Africa* (2016) 186.
[97] Glover *Kerr's Law of Sale and Lease* (2014) 193; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 80; Bradfield *Christie's The Law of Contract in South Africa* (2016) 186.
[98] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 372.

regarding the product during pre-contractual negotiations with the buyer which, if later incorporated into the contract, constitutes such a warranty.[99]

If the seller delivers a product that lacks or falls short of the stipulated qualities, the warranty is breached and the purchaser will have the general remedies for breach of contract.[100] This may include a claim for a reduction in purchase price, cancellation and restitution and contractual damages, including consequential loss.[101] The purchaser's claim for damages pursuant to the *actio empti* is assessed according to the general principles of contractual damages, i.e., to place the purchaser in the same financial position that he or she would have been in had the contract been performed properly (*positive interest*).[102] Liability for consequential loss is limited by what was reasonably foreseeable by the parties at the time of conclusion of the contract.[103]

A seller is strictly liable for breach of warranty and, as such, it is irrelevant whether the seller had taken all reasonable steps to detect or prevent the defect.[104] Further, neither impossibility at formation of the contract nor supervening impossibility exclude liability for breach of warranty.[105]

In practice, express product warranties incorporated into contracts of sale are usually limited to a certain time period following the sale. Express warranties are often also limited

[99] Bradfield *Christie's The Law of Contract in South Africa* (2016) 186; Loubser & Reid *Product liability in South Africa* (2012) 25. See also below at 2.2.2 for discussion of misrepresentation.
[100] Van Rensburg et al 'Contract' in *LAWSA* 3 ed (2014) 372; Bradfield *Christie's The Law of Contract in South Africa* (2016) 186; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 78; Mackeurtan *Mackeurtan's Sale of Goods in South Africa* (1984) 160.
[101] Glover *Kerr's Law of Sale & Lease* (2014) 198-199; 200-201; Mackeurtan *Mackeurtan's Sale of Goods in South Africa* (1984) 160. See generally, Christie's *Law of Contract* (2011) chapters 13, 14.
[102] Bradfield *Christie's The Law of Contract in South Africa* (2016) 642; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 78; Mackeurtan *Mackeurtan's Sale of Goods in South Africa* (1984) 160. See generally, Christie's *Law of Contract* (2011) chapters 13, 14.
[103] Bradfield *Christie's The Law of Contract in South Africa* (2016) 651-655; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 338.
[104] Loubser & Reid *Product Liability in South Africa* (2012) 25.
[105] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 372.

to certain aspects of a product, for instance, a "warranty on parts and accessories only." Further, reliance on product warranties would generally be excluded in cases where the product has been damaged by misuse or negligence of the purchaser or another person after the product left the seller's control. With the exception of contracts of sale where the buyer and seller negotiated the terms, most consumer products that come with an express product warranty would have a carefully worded warranty that is limited in scope as it is determined solely by the party providing that warranty.

In addition to the general remedies for breach of a contractual term relating to the quality of the product, the purchaser may also have aedilitian remedies where the seller made a false pre-contractual statement bearing on the quality of the product or sold the product with a latent defect.[106] The aedilitian remedies allow the purchaser, in appropriate circumstances, to claim cancellation and restitution or a reduction in the purchase price.[107]

2.2.1.2 Implied warranties

Where a seller did not expressly warrant that the product shall possess certain qualities, the seller may nevertheless be bound by an implied warranty term to that effect. Warranties may be implied into a contract of sale from the express terms and the facts surrounding the agreement between the purchaser and seller (tacit terms), by custom or trade usage or by operation of law (*ex lege*).[108]

[106] Glover *Kerr's Law of Sale & Lease* (2014) 193, 208; Bradfield *Christie's The Law of Contract in South Africa* (2016) 344; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 80. See also, discussion of the aedilitian remedies below at 2.2.3.

[107] Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 80.

[108] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 358; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 244; Bradfield *Christie's The Law of Contract in South Africa* (2016) 186 – 205.

A tacit term is a term that the purchaser and seller did not expressly agree upon, but which they both understood to form part of their contract.[109] A discussion of the various tests applied by courts in determining whether a term may be implied into a contract is beyond the scope of this study. However, it is important to note that courts are generally slow to read a tacit term into a contract and would only do so where it is "*necessary to give efficacy to the contract*"[110] and where the implied term is capable of clear and exact formulation.[111] Purchasers may of course be prevented from seeking to rely on an implied warranty where the written terms of the contract of sale prevents any terms as to the quality of the product, other than the express terms, to be implied.

A warranty may be implied by common law or statute into contracts generally or into all contracts of a specific class and is a binding *naturalium* of the contract, unless varied or excluded by the parties.[112] Variation or exclusion of an *ex lege* term is generally permitted, subject to certain statutory exceptions.[113] Of particular importance in the context of product liability are certain residual obligations of a seller implied into contracts of sale by the common law, namely:

> *"…to warrant that the product is fit for its common use, or, in appropriate circumstances, to warrant that the product is suitable for the specific purpose for which it was sold, and to 'warrant' against latent defects in the product."*[114]

If, for instance, the seller of a defective product warranted to the buyer that the product was free of latent defects and such a defect caused the buyer harm, the buyer may have a

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109 Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 247.
110 *Reigate v Union Manufacturing (Ramsbottom)* [1918] 1 KB 592 (CA) at 605. See also: *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* [1974] 3 All SA 497, 1974 (3) SA 506 (A).
111 Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 372; Bradfield *Christie's The Law of Contract in South Africa* (2016) 203-204 and the authorities cited there.
112 Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 237.
113 244-245.
114 Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 67.

cause of action against that seller for breach of contractual warranty as well as a delictual claim for damages. In practice, sellers often exclude this warranty against latent defects by including a so-called *voetstoots* clause in the contract of sale.[115]

Where a seller delivers a defective product in breach of one or more of the implied common law warranties, the purchaser will have the general remedies for breach of a contract of sale pursuant to the *actio empti*.[116] If the product is sold with a latent defect or the seller makes false statements regarding the quality of the product prior to the sale (*dictum et promissum*), the purchaser may also invoke the aedilitian remedies.[117]

Warranties may also be implied into contracts by statute. In what has been described as *"the most expansive legislative incursion into the law of contract so far"*[118] the CPA has introduced a range of new implied terms into contracts and has reduced the circumstances in which parties may exclude these statutorily implied terms and those implied by common law.[119]

2.2.1.3 Remedies for Breach of Contract

Where a seller performs pursuant to a contract of sale by delivering a product in a defective condition, the seller commits breach of contract in the form of positive malperformance.[120] The remedies for positive malperformance are aimed at either

115 See discussion at 2.2.1.4 below.

116 Glover *Kerr's Law of Sale & Lease* (2014) 195, 198-199; 200-201; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 67.

117 Glover *Kerr's Law of Sale & Lease* (2014) 193, 208; Bradfield *Christie's The Law of Contract in South Africa* (2016) 344; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 80. See also, discussion of the aedilitian remedies below at 2.2.3.

118 Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 246.

119 For an overview of statutory warranties implied by the CPA that are relevant to this study, see 4.1.3 below.

120 Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 404; Bradfield *Christie's The Law of Contract in South Africa* (2016) 585; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 294.

rescission or fulfilment of the contract.[121] Regardless of whether the purchaser elects to rescind or affirm the contract, he or she may be entitled to claim consequential damages for loss suffered due to the breach.[122]

2.2.1.3(i) Rescission

The purchaser may rescind the contract of sale if a cancellation clause in the contract permits him or her to do so for that particular type or degree of malperformance, whether serious or not.[123] Where the contract of sale does not contain a cancellation clause, the purchaser is only entitled to rescind if, in light of the nature of the product sold, the defect is sufficiently serious.[124] In essence, the purchaser's right to rescind arises "*only if the breach is so serious that one cannot reasonably expect him or her to abide by the contract and be satisfied with damages alone.*"[125]

A review of the authorities regarding the question of when a breach is considered material enough to justify cancellation of a contract is beyond the scope of this study. However, it should be noted that materiality of the breach is essentially a value judgment by the court involving a balancing act of the competing interests of the contracting parties in order to treat them fairly in the circumstances.[126] In other words, in the context of the sale of a defective product, a purchaser would not necessarily be entitled to claim cancellation of

[121] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 405, 407; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 294; Bradfield *Christie's The Law of Contract in South Africa* (2016) 616.

[122] Glover *Kerr's Law of Sale & Lease* (2014) 149-152; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 297.

[123] Bradfield *Christie's The Law of Contract in South Africa* (2016) 607; *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A).

[124] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 295-6. Case law provides numerous formulations of the test to measure the degree or seriousness of the defect in performance. The test is objective and involves a value judgment by the court, taking into consideration the competing interests of the seller and purchaser, what is reasonable and fair in the circumstances and the fact that rescission is an extraordinary remedy. See also: De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1992) 179.

[125] *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA) 803 at [12], [15].

[126] [15].

the contract. The purchaser would have to satisfy the court that the product defect breaches a term which "*goes to the root of the contract*".[127]

2.2.1.3(ii) Fulfilment of the contract

Where the defect in the product sold is not sufficiently serious to entitle the purchaser to rescission or where the purchaser does not wish to rescind the contract, the purchaser can elect one of the following remedies:

- The purchaser accepts the defective product as partial performance and claims, as fulfilment of the contract, damages for the difference between the value of the defective product supplied and the value of the product without a defect.

- The purchaser rejects the defective product and claims performance of a defect-free product (specific performance), alternatively damages *in lieu* of specific performance (surrogate damages).[128]

Damages *in lieu* of performance (surrogate damages) should be distinguished here from damages awarded for any consequential loss resulting from a breach of contract. For instance, a buyer of a defective product that caused harm to that buyer's person or property may be able to claim delivery of a defect-free product or damages to the value of a defect-free product and in addition, damages for the consequential harm caused by the

[127] *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) 784.
[128] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 405; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 296. See cases cited in De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1992) at 178.

product. However, both types of contractual damages are assessed according to the same general principles for contractual damages,[129] which are discussed below at 2.2.1.3(iii).

2.2.1.3(iii) Damages

In addition to rescission or specific performance of the contract, the purchaser of a defective product may claim damages for any financial loss, including consequential loss, resulting from the breach.[130] Contractual damages are measured according to the purchaser's positive or expectation interest (positive *interesse*).[131] The purpose of contractual damages is to place the purchaser, as far as possible, in the position they would have been had the contract been properly performed.[132]

In order to claim contractual damages, a purchaser of a defective product will have to satisfy the following requirements:[133]

- the seller breached the contract of sale by delivering a defective product;
- the purchaser suffered financial or patrimonial loss;
- there is a factual causal link between the breach and the loss suffered;
- there is a legal causal link, i.e. the loss is not too remote from the breach.

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[129] Glover *Kerr's Law of Sale & Lease* (2014) 198-199; 200-201; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 67; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 296.

[130] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 418.

[131] *Minister van Landbou-tegniese Dienste v Scholtz* 1971 (3) SA 188 (A). See also generally: Lubbe 'The assessment of loss upon cancellation for breach of contract' (1984) *SALJ* 101 at 616; Hutchison 'Back to basics: reliance damages for breach of contract revisited' (2004) 121 SALJ 51.

[132] Bradfield *Christie's The Law of Contract in South Africa* (2016) 642; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 331. See also e.g. *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687. The law is unsettled as to what is covered by positive interest. Case law shows a tendency at times to associate loss of profit from the transaction (expectation loss) with a contractual claim and out-of-pocket expenses (reliance loss) with a delictual claim. However, it is argued that a claim for positive interest should enable the purchase to recover for both loss of profit from the transaction as well as any expenses incurred in reliance on the contract. See discussion in Bradfield *Christie's The Law of Contract in South Africa* (2016) 642 - 647. See also: *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) 808-9.

[133] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 334.

The factual causation requirement is determined by means of the *conditio sine qua non* or 'but for' test.[134] If, but for the seller's breach in supplying a defective product, the purchaser would not have suffered the loss, there is a factual causal link between the breach and loss. A purchaser of a defective product would have to prove this link on a balance of probabilities.[135]

The legal causation requirement queries whether the causal connection between the breach and loss is close enough to justify contractual liability.[136] The distinction between general damages and special damages is relevant here, as explained by Corbett CJ in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*:

> *"To ensure that undue hardship is not imposed on the defaulting party…the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded by the law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach."*[137]

Applying the above distinction in the context of sale of a defective product, a purchaser who incurred costs to repair or replace a defective product will be able to recover these costs as general damages. However if, for instance, the product defect caused a loss of production for the purchaser, this special loss would not be recoverable if the seller could

[134] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 337.
[135] Bradfield *Christie's The Law of Contract in South Africa* (2016) 642.
[136] *International Shipping Co (Pty) Ltd v Bentley* (1990) 1 All SA 498.
[137] 1977 (3) SA 670 (A) at 687. See also Bradfield *Christie's The Law of Contract in South Africa* (2016) 655.

not have foreseen that the product would be used in the purchaser's own manufacturing processes.

The mitigation rule presents a further limitation to damages recoverable for breach of contract. Pursuant to this rule, the innocent party cannot merely sit back and allow his or her losses to accrue; the innocent party is expected to take reasonable steps to prevent or limit the losses.[138] For instance, where a purchaser of a consumable or non-durable product notices a defect, the purchaser is not permitted to let the product go to waste completely and should attempt to limit his or her loss by reselling the product at a lower price or to a different market, or seek to put the product to use in a manner other than originally intended. In this scenario, the purchaser may recover reasonable expenses incurred to carry out any mitigation steps.[139]

In practice, a contractual claim for damages may prove fruitless in circumstances where the seller is merely a retailer, importer or distributor of a defective product manufactured overseas and that retailer, importer or distributor is impecunious and uninsured.

2.2.1.4 Exemption from liability: The *voetstoots* clause

A seller may generally contract out of liability for some or all defects in a product or for misrepresentation regarding the quality or condition of the product, unless prohibited by statute.[140] Framed widely enough, an exemption clause may provide a complete defence

[138] Glover *Kerr's Law of Sale & Lease* (2014) 152-153; Bradfield *Christie's The Law of Contract in South Africa* (2016) 655; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 340, citing *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22.
[139] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 340.
[140] Kerr & Glover 'Sale' in *LAWSA* Vol 24, 55 (2010); Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 79; Glover *Kerr's Law of Sale & Lease* (2014) 287. See also: *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) pars 58-59.

against a contractual or delictual claim based on the existence of a product defect or misrepresentation, with the exception of fraud.[141]

The most common example of an exclusion or exemption clause in contracts of sale is the so-called *voetstoots* or 'as is' clause, which excludes the seller's warranty against latent defects in the product and stipulates that the product is sold 'as is'.[142] Often exemption clauses in contracts of sale will also exclude the seller's liability for any misrepresentation regarding the condition or quality of the product and that the seller does not accept the risk of the presence of any defects.[143] An exemption clause between a seller and a purchaser does not bind subsequent purchasers or other product users who suffer harm as a result of the product defect.[144]

The common law prohibits sellers from contracting out of liability for fraud.[145] For instance, if a seller is aware of a defect in a product and deliberately conceals this knowledge of the defect from the purchaser with an intention to deceive, the seller would not be able to rely on any *voetstoots* clause in the contract of sale to escape liability.[146] In this scenario, the purchaser may have remedies for fraudulent misrepresentation by the seller, which are discussed below at 2.2.2.

[141] Loubser & Reid *Product Liability in South Africa* (2012) 32-33. The scope of an exemption clause depends on its interpretation. Although general rules of construction apply, courts will interpret such clauses restrictively. See: *Van der Westhuizen v Arnold* 2002 (6) 452 (SCA) at [40] per Lewis AJA.
[142] Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 79.
[143] Glover *Kerr's Law of Sale & Lease* (2014) 287; Loubser & Reid 'Product Liability in South Africa' 33;
[144] *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T); Loubser & Reid 'Product Liability in South Africa' 35.
[145] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 334; *Government of the Republic of South Africa v Fibrespinners & Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803.
[146] Glover *Kerr's Law of Sale & Lease* (2014) 287-288; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 79-80.

2.2.2 Misrepresentation

2.2.2.1 Types of Misstatements in a Contractual Context

In the law of contract, a misrepresentation is defined as a "*false statement of past or present fact, not law or opinion, made by one party to another before or at the time of the contract concerning some matter or circumstance relating to it."*[147] A misrepresentation can be categorised as fraudulent, negligent or innocent.[148] The state of mind of the representor determines, to an extent, the remedies available to the representee.[149]

Misrepresentation should be distinguished from other types of misstatements that may be made during pre-contractual negotiations, such as warranties, opinions, statements as to the future, statements of law, puffs (*simplex commendatio*) or *dicta et promissa.*[150] In some cases, the categories of misstatement may overlap, providing the purchaser with a choice of remedies.[151]

2.2.2.2 Remedies for Misrepresentation

2.2.2.2(i) Rescission and restitution

Where the seller's misrepresentation relating to the product has misled and induced the purchaser to enter into the contract of sale, the purchaser generally has the option of cancelling the contract and claiming restitution and in addition, claim damages for loss

[147] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 116; *Wright v Pandell* 1949 (2) SA 279 (C).
[148] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 317.
[149] Bradfield *Christie's The Law of Contract in South Africa* (2016) 341 - 344; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 117.
[150] Hutchison & Pretorius *The Law of Contract in South Africa* (2012)117-120.
[151] 117; *Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (C) 484.

resulting from the misrepresentation.[152] The contractual remedy of rescissions and restitution are discussed above at 2.2.1.3.

2.2.2.2(ii) Damages

The type of misrepresentation made (fraudulent, negligent or innocent) is relevant to the damages recoverable.[153]

A seller who deliberately misleads a prospective purchaser with the aim of inducing him or her into an unfavourable contract (fraudulent misrepresentation), may be liable in delict under the *actio legis Acquiliae* for any resulting loss suffered by the purchaser.[154] A fraudulent misrepresentation does not need to be material in order to claim damages.[155] To succeed with the Aquilian action, the purchaser would have to prove that:

- the seller made a representation;
- which was, to the knowledge of the seller, false;
- which the seller intended the purchaser to act upon;
- which induced the purchaser to act; and
- resulted in the purchaser suffering loss.[156]

In other words, if the seller deliberately conceals from the prospective purchaser the fact that the product to be sold has a defect, inducing the purchaser to buy that product, the purchaser may be able to claim delictual damages if he or she suffers harm due to that

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152 Bradfield *Christie's The Law of Contract in South Africa* (2016) 315; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 122.

153 Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 317; Glover *Kerr's Law of Sale & Lease* (2014) 226; Bradfield *Christie's The Law of Contract in South Africa* (2016) 341 - 344.

154 Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 85; Bradfield *Christie's The Law of Contract in South Africa* (2016) 344.

155 Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 126.

156 Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 85; Bradfield *Christie's The Law of Contract in South Africa* (2016) 345; *Trust Bank of SA Ltd v Coetsee* 1981 (1) SA 1131 (A) 1145; *Ruto Flour Mills (Pty) Ltd v Moriates* 1957 (3) SA 113 (T); *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A).

product defect. It may prove difficult in these cases for a purchaser to establish that the seller did have knowledge of the product defect, especially where that seller was a mere retailer or distributor, as opposed to the manufacturer.

Damages are assessed according to the usual delictual principles, in other words, the defrauded purchaser is entitled to be placed in the financial position he or she would have been in had the fraudulent misrepresentation not been made.[157] The purchaser may recover consequential loss resulting from the fraudulent misrepresentation, provided the loss is not too remote.[158]

Where the purchaser elects to rescind the contract and claim restitution, the damages recoverable are usually only for wasted costs and other consequential losses.[159] If the contract of sale is upheld, the purchaser's damages may include loss resulting from the transaction itself.[160] In this case, it is important to determine whether the circumstances indicate *dolus dans* or *dolus incidens*:

- If the purchaser would never have entered into the contract, had it not been for the fraud (*dolus dans*), the purchaser is entitled to be placed in the financial position he or she would have been if he or she had never contracted with the seller. The purchaser's net loss would equal the purchase price paid minus the actual or fair value of the goods at the time of purchase.[161]

[157] Bradfield *Christie's The Law of Contract in South Africa* (2016) 345-346; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 126; *Trotman v Edwick* 1951 (1) SA 443 (A) at 449. The principles for assessment of delictual damages are discussed below at 2.3.1.1(ii).
[158] *Standard Bank of SA Ltd v Coetsee* 1981 (1) SA 1331 (A) 1145.
[159] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 127.
[160] Ibid.
[161] *Trotman v Edwick* 1951 (1) SA 443 (A) 449.

- If the purchaser would have entered into the contract notwithstanding the fraud, perhaps only on different terms (*dolus incidens*), the purchaser's damages would equal the extent to which the representation inflated the seller's performance, i.e. the actual purchase price paid minus the price the purchaser would have paid but for the misrepresentation (the putative price).[162]

A negligent misrepresentation inducing a contract is actionable in delict, provided the elements of the Aquilian action are satisfied.[163] Where the seller negligently makes a misrepresentation relating to the quality of the product that induces the purchaser to buy the product, the purchaser may invoke the Aquilian action unless that misrepresentation is incorporated into the contract as a warranty, in which case the purchaser may recover contractual damages for breach.[164] Delictual damages for negligent misrepresentation are assessed according to the same general principles applied in the case of fraudulent misrepresentations.[165]

Where a seller made an innocent misrepresentation inducing the purchaser to enter into the contract, the purchaser is not entitled to claim damages.[166]

[162] Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 127-128.
[163] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 321; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).
[164] Loubser & Reid *Product Liability in South Africa* (2012) 30.
[165] Bradfield *Christie's The Law of Contract in South Africa* (2016) 344; Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 131. The principles for assessment of delictual damages are discussed below at 2.3.1.1(ii).
[166] Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 321.

2.2.3 Aedilitian Remedies for Dicta et Promissa and Latent Defects

In addition to the general common law remedies available for misrepresentation and breach of contract, the purchaser of a defective product may also invoke the aedilitian remedies in cases where the seller:

- sold a product with a latent defect, or
- made a false pre-contractual statement (*dictum et promissum)* bearing on the quality of the product sold.[167]

The aedilitian remedies are generally restitutionary in nature and, depending on the circumstances, will allow the purchaser to claim either a price reduction with the *actio quanti minoris* or cancellation of the contract with the *actio redhibitoria*.[168]

In special cases, an aedlilitian action may coincide with a claim for consequential damages where a defective product is sold, for instance, where:

- the seller gave an express warranty that the product was defect free;
- the seller had knowledge of the latent defect in the product;
- the seller is a manufacturer or a merchant seller who publicly professed special knowledge of the product.[169]

2.2.3.1 Dicta et Promissa

The purchaser may invoke aedilitian remedies where the seller made false, material, pre-contractual statements bearing on the quality of the product and going beyond mere praise

[167] Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 180; Glover *Kerr's Law of Sale & Lease* (2014) 226.
[168] Glover *Kerr's Law of Sale & Lease* (2014) 211, 217; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 83 - 84.
[169] Loubser & Reid *Product Liability in South Africa* (2012) 27; Bradfield & Lehmann *Principles of the Law of Sale and Lease* (2013) 83 - 84.

and commendation (*dicta et promissa*), which had the effect of inducing the purchaser to contract or agree to a higher price.[170] Whether the seller's pre-contractual statement went beyond mere praise or commendation depends on the factual circumstances of each case.[171]

It is not a requirement for aedilitian relief on the basis of *dicta et promissa* to show that the seller was aware that his statements are false.[172] However, if the seller knowingly and deliberately made false statements in an effort to induce the purchaser to contract, the purchaser may claim consequential damages for fraud.[173]

2.2.3.2 Latent defects

The common law imposes a duty on a seller to disclose and assume responsibility for all latent defects in the product sold.[174] A product is defective if it has *"an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used.*[175]

In determining whether the product defect is latent, courts have applied varying tests, asking whether the defect was 'easily visible' or whether the defect was reasonably discoverable upon inspection by an ordinary purchaser.[176]

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[170] *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 417H-418A.

[171] 418B-C. Courts will consider various factors, including: whether the statement was made in answer to a direct question by the purchaser; whether the statement was material to the known purpose for which the purchaser was buying the product; whether the statement was fact or opinion and whether it would be obvious, even to gullible persons, that the seller was merely singing the praises of its wares (at 418B-C).

[172] Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2013) 47; Voet 21.1.10; Pothier *Vente* par 213.

[173] Ibid; Van Rensburg et al 'Contract' in Joubert et al (eds) *LAWSA* vol 9, 3 ed (2014) 319.

[174] Mackeurtan *Mackeurtan's Sale of Goods in South Africa* (1984) 126.

[175] *Holmdene Brickworks (Pty) Ltd v Roberts Constructions Co Ltd* 1977 (3) SA 670 (A) at 683H.

[176] Bradfield & Lehmann Principles of the Law of Sale & Lease (2013) 77 at footnote 541, discussing *Holmdene Brickworks (Pty) Ltd v Roberts Constructions Co Ltd* 1977 (3) SA 670 (A); *Waller v Pienaar & Another* 2004 (6) SA 303 (SCA) at [15.6]. It is unclear whether the test would be different where the

Whether the seller had knowledge of the latent defect in a product is irrelevant to the seller's liability, which arises from the mere fact that there was a defect at the time of sale.[177] However, the seller's state of mind may impact on the scope of liability.[178]

In circumstances where the purchaser was or should have been aware of the latent defect, the aedilitian remedies are not available.[179] However, if the purchaser merely suspected a latent defect, the purchaser is not precluded from bringing an aedilitian action against the seller.[180]

A seller will not be liable for latent defects in the product sold in circumstances where:[181]

- the seller warned the purchaser of the defect;
- the purchaser obtained knowledge of the defect from a source other than the seller;
- the seller expressly contracted out of the warranty against latent defects; or
- it is clear from the particular circumstances that the purchaser assumed the risk of any latent defect in the product.

2.2.3.3 Latent Defects, Manufacturers and Merchant-Sellers

In special circumstances, the purchaser may recover consequential damages from a seller for a latent defect in the product. Pursuant to the so-called *Pothier rule*, consequential loss may be recoverable where:

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purchaser has expert knowledge of the product sold or engaged an expert to inspect the product prior to the sale (see *Holmdene Brickworks (Pty) Ltd v Roberts Constructions Co Ltd* 1977 (3) SA 670 (A) at 684A-C).

[177] Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2013) 78.

[178] Ibid; Mackeurtan *Mackeurtan's Sale of Goods in South Africa* (1984) 138-9.

[179] *SA Wood Turning Mills (Pty) Ltd v Price Bros (Pty) Ltd* 1962 (4) SA 263 (T).

[180] *Robertse v Rustenburg Boeren Ko-operatiewe Vereniging* 1919 TPD 263 at 265.

[181] Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2013) 78; *J K Jackson (Pty) Ltd v Salisbury Family Health Studio (Pvt) Ltd* 1974 (2) SA 619 (RA) 623.

- the seller is the manufacturer of the product; or
- the seller is a merchant who publicly professes to have attributes of skill and expert knowledge in relation to the kind of products sold.[182]

Liability for consequential loss resulting from latent defects will attach unless the seller has expressly or by implication contracted out of it.[183] Courts appear to regard the remedy as contractual in nature.[184] This means that the purchaser is not required to establish fault on the part of the manufacturer or merchant seller.

It is worth noting that the notion 'manufacturer' has been interpreted broadly by courts to include those sellers who do not necessarily 'manufacture' a certain product *per se*, but who have 'produced' it as a by-product of another production process.[185] For example, a seller who is in the business of quarrying rock from a riverbed and converting it into lime for the construction industry and who creates, as a by-product of this process, sand and dolomitic aggregate, which also have commercial value. If these by-products are sold and they have a latent defect, this seller may be held liable under the *Pothier* rule for consequential damages.[186]

[182] Glover *Kerr's Law of Sale & Lease* (2014) 202 - 208; Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2013) 84; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd 2002* (2) SA 447 (SCA) at [48].
[183] Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2013) 79; See discussion at 2.2.1.4 above.
[184] *Wagner v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) [22]; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) [48].Glover *Kerr's Law of Sale & Lease* (2014) 203; Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2013) 85.
[185] Glover *Kerr's Law of Sale & Lease* (2014) 202.
[186] *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 3 SA 593 (SCA) 32-36.

2.3 DELICTUAL LIABILITY FOR PRODUCT DEFECTS

2.3.1 The Aquilian Action

At common law, harm or loss caused by a product defect may be actionable on the basis of contract or delict.[187] As noted above at 2.2, the doctrine of contractual privity limits the scope of contractual remedies to situations where a direct contractual relationship exists between the person who suffered harm and the supplier of the defective product. This effectively excludes third parties, for instance, family members, donees, employees of the purchaser or mere bystanders from suing in contract, even though harm to the third party might have been entirely foreseeable.[188] In the absence of a contractual relationship, the plaintiff's recourse would be a claim in delict against the manufacturer of the defective product.[189]

The delictual remedy for harm caused by a defective product is the fault-based Aquilian action.[190] The basis for manufacturer's liability was explained by the Appellate Division in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*[191] as follows:

> *"If a manufacturer produces and markets a product without conclusive prior tests, when the utilisation thereof in the recommended manner is potentially hazardous to the consumer, such negligence on the part of the manufacturer may expose him to delictual liability to the consumer. Where the consumer does not acquire the product directly from the manufacturer, and the manufacturer is thus a third party, such liability amounts to what is sometimes termed 'product liability'. A contractual nexus between the manufacturer and the consumer is not required. Although the historical origin of the manufacturer's liability is an agreement between the*

[187] Van Eeden *Consumer Protection Law in South Africa* (2013) 367; Loubser & Reid *Product Liability in South Africa* (2012) 38.
[188] Van Eeden *Consumer Protection Law in South Africa* (2013) 367.
[189] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 93.
[190] *Wagener & Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA) at 19; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty)* Ltd 2011 3 All SA 362 (SCA) at 36.
[191] 2002 (2) SA 447 (SCA).

> *manufacturer and the distributor, the liability, which arises from the manufacture and distribution of the product, extends via the other contracting party to any third party who utilises the product in the prescribed manner and suffers damages as a result thereof. It follows as a matter of course that a manufacturer who distributes a product commercially, which, in the course of its intended use, and as the result of a defect, causes damage to the consumer thereof, acts wrongly and thus unlawfully according to the legal convictions of the community."*[192]

To succeed with the Aquilian action, it must be established that the defendant wrongfully and negligently caused harm by producing or distributing a defective product, in breach of its duty of care to the consumer.[193] The elements of the Aquilian action, in the context of harm caused by a defective product, are discussed below.

2.3.1.1 The Elements of Aquilian liability

2.3.1.1(i) Conduct

In the context of manufacturer's liability, the relevant juridical conduct is the voluntary control and supervision exerted over, and organisation of the complex process of industrial production.[194] Industrial production encompasses the design process, manufacturing and distribution of the product. As automatisation increases in the production process, the role of human activity in the process shifts from direct, physical involvement to control and organisation of the process, however, this makes the manufacturer's conduct no less individualistic and voluntary.[195]

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[192] [64], [66].
[193] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 93; Loubser & Midgley *The Law of Delict in South Africa* (2012) 248.
[194] De Jager 'Die grondslae van produkte-aanspreeklikheid ex delicto in die Suid-Afrikaanse reg' (1978) THRHR, 41 at 353.
[195] Ibid.

In the case of a distributor, wholesaler or retailer, the relevant juridical conduct may involve taking delivery of the product, transportation, storage, packaging, repackaging and on-sale of the product. During this process, the distributor or retailer handles the product and may have the opportunity to conduct inspections or quality controls prior to on-sale to a subsequent supplier or the ultimate consumer.

2.3.1.1(ii) Harm and damages

The law of delict recognises two general categories of harm: patrimonial and non-patrimonial harm.[196] Patrimonial harm is defined as a negative impact on a person's financial estate and falls into three general categories: financial loss associated with personal injury; financial loss associated with property damage and pure economic loss (not associated with personal injury or property damage).[197]

Where a product defect caused patrimonial harm, the plaintiff's remedy lies in the *lex Aquilia*. The purpose of Aquilian damages is to restore the plaintiff to the position he or she would have been in had the delict not been committed.[198] The extent of patrimonial harm is assessed by means of a comparative method known as the 'sum-formula' or 'negative interesse formula'.[199] This method compares the plaintiff's actual position as a result of the delict to the hypothetical position that the plaintiff would have obtained had there been no delict.[200] The negative difference between the two positions constitutes the plaintiff's

[196] Neethling, Potgieter & Visser *Deliktereg* (2014) 229; Loubser & Midgley *The Law of Delict in South Africa* (2012) 49-50.
[197] Loubser & Midgley *The Law of Delict in South Africa* (2012) 50.
[198] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 192.
[199] Potgieter, Steynberg & Floyd *Visser & Potgieter Skadevergoedingsreg* (2012) 72.
[200] *Transnet Ltd v Sechaba Photoscan* (Pty) Ltd 2005 (1) SA 299 (SCA) at [15].

patrimonial harm.[201] Once the extent of the harm is assessed, a court can ascribe a monetary value to that loss.

Where a product defect results in property damage, the starting point for assessing loss is the sum-formula.[202] This formula is supplemented by one of the following tests: diminution in market value or reasonable repair costs.[203] If property was damaged, the plaintiff has to prove the difference in market value of the property prior to and after the delict.[204] If property was completely destroyed, the loss equals the market value of the property at the time of destruction.[205] Where it is too difficult or impossible to determine the market value of the damaged property, an alternative is to determine the reasonable repair costs.[206] The reasonable repair costs method would not be suitable in circumstances where the property was severely damaged or destroyed, such that the repair costs would be more than the value of the property prior to the harm.[207] In the context of a defective product that causes harm to a plaintiff's person or property, any loss resulting from damage to the defective product itself, if that defective product was owned by the plaintiff, would also be recoverable by way of the Aquilian action.

Where a product defect caused personal injury, a plaintiff may seek to recover past and future medical expenses, rehabilitation costs, psychiatric expenses, past loss of earnings, future loss of earnings or loss of earning capacity.[208] Where a defective product has

[201] Neethling, Potgieter & Visser *Deliktereg* (2014) 237-238.
[202] Loubser & Midgley *The Law of Delict in South Africa* (2010) 417.
[203] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 195.
[204] *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C). See also: Potgieter, Steynberg & Floyd *Visser & Potgieter Skadevergoedingsreg* (2012) 420 - 421.
[205] Ibid; Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 195.
[206] Loubser & Midgley *The Law of Delict in South Africa* (2012) 417.
[207] *Erasmus v Davis* 1969 (2) SA 1 (A) at 18E-G.
[208] Neethling, Potgieter & Visser *Deliktereg* (2014) 254; *De Jongh v Du Pisano NO* 2005 5 SA 457 (SCA); *Singh v Ebrahim* (1) [2010] 3 All SA 187 (D).

injured or killed a breadwinner, the dependants may seek to recover loss of past and future support.[209]

A product defect may also cause a plaintiff non-patrimonial harm, which is not recoverable with the Aquilian action.[210] Non-patrimonial harm refers to all forms of harm that cannot be quantified in monetary terms and can be broadly subcategorised as pain and suffering or infringement of personality rights.[211] A plaintiff who was physically injured due to a product defect may experience physical and psychological pain associated with that injury and loss of amenities of life.[212] Compensation for pain and suffering can be recovered by means of the Germanic remedy, also known as the action for pain and suffering.[213] The process of quantifying damages for non-patrimonial harm is often speculative and based on courts' general discretion as there are no set principles in this regard.[214] Courts may seek guidance from comparable cases where available.[215]

2.3.1.1(iii) Causation

A plaintiff who has suffered harm due to a defective product has to prove a causal link between the defendant's conduct, for instance the manufacture or distribution of the defective product, and the harm suffered by the plaintiff.[216]

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[209] Loubser & Midgley *The Law of Delict in South Africa* (2012) 421.
[210] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 192.
[211] Potgieter, Steynberg & Floyd *Visser & Potgieter Skadevergoedingsreg* (2012) 103.
[212] Neethling, Potgieter & Visser *Deliktereg* (2014) 260 - 261;
[213] Loubser & Midgley *The Law of Delict in South Africa* (2012) 424.
[214] Ibid. For a general discussion of the principles or factors considered in quantifying damages for non-patrimonial harm, see for instance: Boberg *The Law of Delict: Vol I Aquilian Liability* (1984) 535-547; Potgieter, Steynberg & Floyd *Visser & Potgieter Skadevergoedingsreg* (2012) 495. See also: *Road Accident Fund v Marunga* 2003 4 SA 164 (SCA).
[215] *Protea Assurance Co Ltd v Lamb* 1971 1 SA 530 (A) 535-536.
[216] Loubser & Reid *Product Liability in South Africa* (2012) 53.

In the law of delict, the element of causation involves two separate enquiries, namely factual causation and legal causation,[217] as described by the Appellate Division in *Minister of Police v Skosana:*[218]

> *"Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to…the harm giving rise to the claim. If it did not, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensure or whether, as it is said, the harm is too remote. This is basically a juridical problem, in which considerations of legal policy may play a part."*[219]

The primary test for factual causation is the *conditio sine qua non* or so-called 'but for' test.[220] According to this test, there is a factual causal link if, but for the defendant's conduct, the harm would not have occurred.[221] The onus is on the plaintiff to show, on a balance of probabilities, that the defendant's conduct was a necessary condition of the harm.[222]

Proving factual causation in a product liability claim often presents a significant obstacle to plaintiffs, particularly in the case of complex products, as it requires plaintiffs to collect sufficient technical information about the product, the accident circumstances and the conduct of the parties involved. To alleviate the plaintiff's burden of proof, the doctrine of

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[217] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 175.
[218] 1977 1 SA 31 (A).
[219] [34] - [35]. See also: *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700.
[220] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 180; Loubser & Midgley *The Law of Delict in South Africa* (2012) 71. Although the starting point, this test is not suitable in all cases. Courts will consider the circumstances and relevant policy to determine whether to deviate from the traditional test and, if so, which test. Alternative tests may involve a common sense approach or consideration of material contribution. See the authors' discussion at 77-84.
[221] *Minister of Finance and others v Gore* NO 2001 (1) SA 111 (SCA) at [32].
[222] Loubser & Midgley *The Law of Delict in South Africa* (2012) 71.

res ipsa loquitur may theoretically be invoked to create an inference of fault where: (a) the product defect has been proved; (b) the defendant had exclusive control of the product and (c) the accident was of such a kind that would ordinarily not occur without fault.[223] It is worth noting that case law on the *res ipsa loquitur* doctrine is limited and is yet to be applied in a product liability case brought under the Aquilian action.[224] Therefore, whilst theoretically possible, the doctrine seems to be of little assistance to plaintiffs in this context.

Particular problems relating to factual causation may arise depending on the nature of the product and the type of defect. Where a manufacturing defect not only harmed the plaintiff but damaged or even destroyed the product itself, it may be difficult for the plaintiff to collect the necessary evidence to prove the causal link. For instance, a faulty electrical appliance that caused an entire house to burn down or a faulty vehicle severely damaged in a collision. In the context of an alleged design defect, it may be difficult for the plaintiff to prove that an alternative design or safety enhancements would have eliminated the risk of harm where no such alternative design was available on the market, and the safer alternative is merely hypothetical. Further, it may be exceedingly difficult to establish a factual causal link between a product defect and harm where there are competing, equally plausible theories unrelated to the defective product as to the cause of the harm. For example, if a plaintiff is exposed to asbestos products at his place of employment over a period of time and was also subject to atmospheric low-level exposure to asbestos for a prolonged period, it may be difficult to prove that exposure to the asbestos products was the factual cause, on balance of probabilities, of the plaintiff's asbestos-related disease.

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[223] *Bayer South Africa (Pty) Ltd v Viljoen* 1990 (2) SA 647 (A) at 662.
[224] Loubser & Reid *Product Liability in South Africa* (2012) 109.

Once factual causation is established, the next question is whether the wrongful conduct, in this context the supply of a defective product, and the harm are linked sufficiently closely to justify legal liability.[225] Legal causation is a normative mechanism through which legal liability is limited to those consequences that can fairly be attributed to the defendant.[226] As explained by the Appellate Division in *International Shipping Co (Pty) Ltd v Bentley*:[227]

> *"…demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, namely, whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensure or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation."*[228]

Over the years, courts have developed several tests for legal causation. These include the direct consequences test, the reasonable foreseeability test, the *novus actus interveniens* concept and the adequate cause test.[229]

According to the 'direct consequences' theory, the test for legal causation will be met if the harm was a direct result of the defendant's wrongful conduct, irrespective of whether that result was foreseeable.[230] The chain of causation may be broken by a *novus actus interveniens,* such as an act of God or a third party.[231]

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225 Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 181; Neethling, Potgieter & Visser *Deliktereg* (2014) 202; *Smit v Abrahams* 1994 4 SA 1 (A) 16.
226 Loubser & Midgley *The Law of Delict in South Africa* (2012) 90.
227 1990 (1) SA 680 (A)
228 [700].
229 Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 181; Neethling, Potgieter & Visser *Deliktereg* (2014) 204.
230 Van der Walt & Midgley *Principles of Delict* (2005) 132, 134.
231 Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 184; Loubser & Reid *Product Liability in South Africa* (2012) 104.

Pursuant to the 'foreseeability' theory, liability is limited to those consequences of the defendant's actions which he or she could reasonably have been expected to have foreseen.[232] To establish legal causation under this theory, it does not have to be shown that the defendant reasonably foresaw the exact or precise consequences of his or her actions; the defendant merely had to foresee the general nature or the kind of harm which actually occurred.[233]

A third, less frequently used theory is that of 'adequate cause'. This theory incorporates both factual and legal enquiries and considers whether the defendant's conduct is adequately or appropriately linked with the harm which is alleged to have been caused.[234]

In the criminal case of *S v Mokgethi,*[235] the Appellate Division adopted a flexible test encompassing all the existing tests for legal causation and based on policy considerations based on reasonableness, fairness and justice. The court held that the existing tests for legal causation would not be abolished, but that they could be applied as subsidiary tests depending on the facts of the case.[236] Shortly after this decision, the Appellate Division applied the same flexible approach to delictual liability.[237] In *Fourway Haulage SA (Pty Ltd v SA National Roads Agency Ltd*[238] the Supreme Court of Appeal confirmed the flexible test and clarified the relationship between this test and the subsidiary tests.[239]

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232 Van der Walt & Midgley *Principles of Delict* (2005) 208-210; Boberg *The Law of Delict: Vol I Aquilian Liability* (1984) 442-445; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 198; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 165.

233 *Masiba v Constantia Insurance Co Ltd* 1982 (4) SA 333 (C) 342; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 768; *Smit v Abrahams* 1992 (3) SA 158 (C) 163-164.

234 Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 186; Neethling, Potgieter & Visser *Deliktereg* (2014) 208-209; *Smith v Abrahams* 1992 3 SA 158 (C) 162.

235 1990 (1) SA 32 (A).

236 92.

237 *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) 680 A.

238 2009 (2) SA 150 (SCA).

239 [34]-[35].

In the context of legal causation in a product liability claim, a defendant manufacturer may seek to show that, after a defective product failed and caused harm to the plaintiff, a subsequent intervening event caused further harm to the plaintiff for which the manufacturer should not be liable. For instance, a plaintiff suffers serious injuries in a motor vehicle accident due to a defect in the plaintiff's vehicle. The plaintiff then undergoes surgery and suffers further harm due to medical negligence. In this scenario, there is a factual causal link between the manufacturer's supply of a defective vehicle and the plaintiff's ultimate harm as he or she would not have suffered that harm at the hand of the negligent surgeon had it not been for the defective vehicle. However, the surgeon's negligence resulting in further harm to the plaintiff would break the chain of legal causation in relation to that further harm.

The South African Constitutional Court has recently delivered a judgment regarding the appropriate test for factual causation in *Lee v Minister of Correctional Services.*[240] Before discussing this judgment, it is necessary to draw a distinction between those cases where the facts are able to support factual causation on a balance of probabilities and those cases where factual causation is ambiguous in that there are two or more competing, but independent potential causes of the harm and insufficient evidence to pinpoint the true cause(s) on a balance of probabilities.[241] Some common law jurisdictions expressly distinguish between these two types of cases and approach the factual causation test differently in ambiguous causation cases. The reason for this is that the 'but-for' test for factual causation would never favour the plaintiff in ambiguous causation cases as the plaintiff is unable, by definition, to establish the cause of harm on a balance of

[240] 2013 (2) SA 144 (CC).

[241] Such cases are termed in US literature as 'ambiguous cause-in-fact cases'. See eg. Knutsen 'Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach' (2003) *Texas International Law Journal* vol 38, 249.

probabilities.[242] A formal distinction between more straightforward and more ambiguous factual causation cases is not made in South African law, however, the Appellate Division in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*[243] has alluded to this distinction.[244]

The *Lee* case is an example of such an ambiguous factual causation scenario. This case involved a delictual claim by the plaintiff against the Minister of Correctional Services on the basis that he contracted pulmonary tuberculosis ('TB') during his detention in prison from 1999 to 2004 whilst awaiting trial due to poor prison health management. He was released in 2004 upon acquittal. The main legal question in this case turned on factual causation, namely whether or not proper prison health management would have prevented the plaintiff contracting TB or whether the infection was simply an unavoidable risk faced by prisoners, even under proper prison health management. At first instance, the High Court[245] approached the factual scenario as a straightforward factual causation case and applied the traditional common law 'but-for' test to determine factual causation. The High Court found in favour of the plaintiff, stating that:

> *"On the totality of the evidence, I am accordingly satisfied that it is more probable than not that the plaintiff contracted TB as a result of his incarceration in the maximum security prison at Pollsmoor."*[246]

On appeal, the Supreme Court of Appeal (SCA)[247] dealt with the factual scenario as an ambiguous factual causation case and unanimously applied the traditional 'but-for' test to determine factual causation, finding in favour of the defendant. The SCA held that:

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[242] Veldsman 'Factual causation: One size does not fit all' (2013) *De Rebus* 247.
[243] 1984 (2) SA 888 (A) at 915.
[244] Veldsman 'Factual causation: One size does not fit all' (2013) *De Rebus* 32 at 247.
[245] *Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC).
[246] [236].

> *"The difficulty that is faced by Mr Lee is that he does not know the source of his infection. Had he known its source, it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the prison authorities. Instead he has found himself cast back upon systemic omission. But, in the absence of proof that reasonable systemic adequacy would have altogether eliminated the risk of contagion, which would be a hard row to hoe, it cannot be found that but for the systemic omission he probably would not have contracted the disease. On that ground I think that the claim ought to have failed."*[248]

Before the Constitutional Court,[249] all judges unanimously agreed that the SCA's judgment achieved an unjust outcome. However, there was disagreement among the judges as to the correct test for factual causation.

The minority in the CC found that the SCA had correctly applied the traditional common law 'but-for' test and that the common law should be developed in such a way that an unjust result, such as the SCA's judgment, is avoided in the future. The minority judgment considered foreign case law dealing with ambiguous cause-in-fact cases, and concluded that they would have remitted the proceeding to the trial court so that the common law could be developed.

In contrast, the majority in the CC held that the SCA had incorrectly applied the traditional 'but-for' test for factual causation and that the common law need not be developed in order to achieve a just outcome in this case. However, it is argued that the majority judgment did

[247] *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA).
[248] [64].
[249] *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC).

develop the common law, even if only *obiter*, in relation to ambiguous factual causation cases.[250] The majority, per Nkabinde J, supported the High Court's judgment, stating that:

> *"There was thus nothing in our law that prevented the High Court from approaching the question of causation simply by asking whether the factual conditions of Mr Lee's incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions. That is what the High Court did and there was no reason, based on our law, to interfere with that finding."*[251]

The majority judgment of the CC seems to support the so-called 'material contribution to risk' approach, recognised by some common law jurisdictions as a solution to the inadequacy of the 'but-for' test in ambiguous factual causation cases.[252] Generally speaking, a 'material contribution to risk' approach allows factual causation to be made out against a defendant where the plaintiff can show that a negligent act by that defendant, out of a number of negligent acts by multiple defendants or other causes, materially increased the risk of injury, without proving actual 'but-for' causation. This approach is typically applied in cases where it is impossible to determine which defendant(s) or causes, out of a number of defendants or causes, were responsible for the harm. The majority in *Lee*, per Nkabinde J, stated:

> *"It would be enough, I think, to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures."*[253]

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[250] Veldsman 'Factual causation: One size does not fit all' (2013) *De Rebus* 32 at 247.
[251] [55].
[252] Veldsman 'Factual causation: One size does not fit all' (2013) *De Rebus*, where a discussion is provided of the application of this approach in the USA, the UK and Canada.
[253] [60].

The minority judgement criticises this 'material increase in risk' approach, *inter alia*, on the basis that it may have the effect that a very small increase in an existing significant risk could result in liability,[254] thereby opening the floodgates of litigation.

Based on the Constitutional Court's judgment in *Lee* it appears that, in ambiguous factual causation cases where a plaintiff's harm may plausibly have been caused by a defective product and another, unrelated negligent act or cause, a plaintiff may establish factual causation against the defective product supplier simply by showing the defective product had increased the risk of harm. However, the Constitutional Court does not make it clear whether the contribution to the risk of harm ought to have been a material or substantial increase in risk, or whether a minuscule increase in risk would be enough to establish factual causation in these cases. Judicial clarification would be welcomed in this regard.

2.3.1.1(iv) Negligence

In the context of product liability, the element of fault is generally negligence, as it would be a rare scenario where a manufacturer intentionally harmed consumers by putting defective products into circulation.

The element of negligence involves a duty to avoid reasonably foreseeable harm.[255] Negligence is assessed by measuring the defendant's conduct against the standard of care a reasonable person would have applied in the same circumstances.[256] The most

[254] Per Cameron J at [105]-[108].
[255] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 148; Loubser & Reid *Product Liability in South Africa* (2012) 46.
[256] Neethling, Potgieter & Visser *Deliktereg* (2014) 143; Van der Walt & Midgley *Principles of Delict* (2005) 166.

frequently cited test for negligence was formulated by the Appellate Division in *Kruger v Coetzee:*[257]

> *"For the purposes of liability culpa arises if - (a) a diligens paterfamilias in the position of the defendant - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps."*[258]

The test in *Kruger v Coetzee* incorporates a foreseeability requirement in the abstract or general sense. The test was reformulated in *Mukheiber v Raath*[259] where the Supreme Court of Appeal incorporated a more specific foreseeability requirement:

> *"For the purposes of liability culpa arises if (a) a reasonable person in the position of the defendant (i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal sequence by which that harm occurred; (iii) would have taken steps to guard against it, and (b) the defendant failed to take those steps."*[260]

However, these tests are no more than guidelines or approaches to assessing negligence. In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*[261] the Supreme Court of Appeal followed a more general approach:

> *"In the ultimate analysis the true criterion for determining negligence is whether, in the particular circumstances, the impugned conduct falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue."*[262]

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[257] 1966 (2) SA 428 (A).
[258] [430].
[259] 1999 (3) SA 1065 (SCA).
[260] 1077E-F.
[261] 2000 (1) SA 827 (SCA).
[262] 839F.

In determining whether the harm was foreseeable, courts will take into account all the circumstances of the case and particular considerations such as:[263]

- the likelihood that a person in the plaintiff's position would have suffered harm;
- whether the kind of harm that occurred was reasonably foreseeable;
- whether the general manner in which the harm occurred was reasonably foreseeable;
- the likelihood of the harm occurring;
- the likely extent of the harm.

In the context of product liability, a court would therefore consider whether, from the manufacturer's perspective, it was reasonably foreseeable that a particular defect in a product would cause the harm suffered by the plaintiff. In considering foreseeability, courts may, for example, have regard to the state of scientific knowledge reasonably available or accessible to manufacturers at the time the product was put on the market to enable a defect to be identified prior to circulating the product. Courts may also have regard to the manner in which the plaintiff used the product. If a plaintiff misused a product in such an extreme way, it may be held that it was not reasonably foreseeable by manufacturers that a product would be used in such a way, and therefore, the harm was not reasonably foreseeable. Further, if the harm caused to the plaintiff was so unusual, for instance, a highly idiosyncratic and rare adverse reaction to a pharmaceutical product, it may be found that the harm suffered was not reasonably foreseeable in the circumstances.

If it is found that the harm was reasonably foreseeable, the second part of the negligence enquiry is whether a reasonable person in the circumstances would have done anything to

[263] Loubser & Reid *Product Liability in South Africa* (2012) 47-48 and case law cited here; Neethling, Potgieter & Visser *Deliktereg* (2014) 156 and case law cited here.

prevent the harm.[264] In this regard, courts assess what preventative steps were reasonably available and practicable in the circumstances.[265] In determining reasonable measures that could have prevented the occurrence of foreseeable harm, courts have considered factors such as:[266]

- whether the degree of risk of harm and extent of the consequences required more extensive protective measures;
- whether the social utility of the risk-creating conduct justifies the extent of the risk of harm;
- the cost and burden of adopting possible precautionary measures weighed up against the risk of harm;
- the likelihood of the preventative measures succeeding in preventing the harm.

In the context of product liability, the reasonable preventability enquiry would involve asking whether the defendant-manufacturer failed to take reasonable care in its design, production or quality control processes to prevent reasonably foreseeable harm to consumers of the product. Here, courts may again give consideration to the state of science and technology reasonably available and accessible to manufacturers to improve their production or quality control processes and whether the costs of adopting those improved methods would be justified given the reduction of risk it would achieve. Courts would generally consider what was reasonably foreseeable and preventable at the time the product was put on the market.[267]

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[264] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 162; Neethling, Potgieter & Visser *Deliktereg* (2014) 156; Loubser & Midgley *The Law of Delict in South Africa* (2012) 124.
[265] Ibid.
[266] *Ngubane v South African Transport Services* 1991 (1) SA 756 (A); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); Van der Walt & Midgley *Principles of Delict* (2005) 179.
[267] Loubser & Reid *Product Liability in South Africa* (2012) 49.

More specifically, breach of a manufacturer's duty to avoid reasonably foreseeable harm to consumers of a product may involve, for instance, a failure to:

- comply with relevant design or safety standards or regulations;
- conduct adequate safety testing prior to making the product commercially available;
- ensure that product components or ingredients are sourced from reputable suppliers and comply with safety standards or regulations;
- adopt adequate quality control measures such as product inspection or sampling, regular audits of production lines or processes;
- provide adequate product information, instructions for safe use or warnings of potential risks in using the product.

A wholesaler, distributor or retailer further down the supply chain may also owe a duty of care to conduct quality controls prior to on-supply of products to consumers, particularly in cases where that non-manufacturing supplier had the opportunity to inspect the products while in its possession or control.

Where the plaintiff had the opportunity to inspect the product prior to use, the foreseeability requirement may present difficulties in establishing negligence. For example, in *A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd*[268] the plaintiff was a building contractor who purchased scaffolding boards from a building supplies merchant. A patent defect in one of the boards caused injury to an employee of a subcontractor and the plaintiff sought damages from the merchant. The question of negligence turned on whether the merchant had a duty to exercise reasonable care by inspecting the scaffolding boards individually before supplying them to the plaintiff. The court held the merchant was not

[268] 1975 (2) SA 457 (W).

negligent. On the facts, the harm was not foreseeable as a reasonable timber merchant would have expected a building contractor to inspect the scaffolding boards for defects prior to use.

Establishing negligence on the part of a manufacturer often presents a weighty or insurmountable evidential burden. Expert evidence is often required to establish that the manufacturer could reasonably have foreseen the harm and taken reasonably available, practicable and economically feasible measures to prevent it. However, consumers are generally unfamiliar with the technicalities of production processes or the scientific knowledge or technology applied and available at the relevant time. Manufacturers generally have more financial and informational resources available to produce expert evidence in defence of their production processes and products. For instance, in the context of a pharmaceutical product, the manufacturer would produce substantial amounts of evidence regarding its scientific research and development, clinical trials and quality control processes to show that it had taken reasonable steps in ensuring its product, which has social utility, was as safe as reasonably possible.[269]

This informational and financial imbalance between plaintiffs and manufacturers in the practical conduct of product liability claims is also problematic in the context of establishing causation, as discussed above at 2.3.1.1(iii).

[269] See for instance, the case of *Wagener & Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA), involving a pharmaceutical product.

2.3.1.1(v) Wrongfulness

Wrongfulness refers to the unreasonable causing of harm.[270] It signifies that the harm caused is sufficiently unreasonable or unacceptable for the law of delict to impose liability, provided the other requirements are also met.[271] It adds a value or policy-based dimension to the test for delictual liability and involves judicial discretion in determining the scope of protection afforded to various rights and interests, the scope of responsibility to act and overall policy considerations as to whether the law of delict should intervene.[272] Wrongfulness was described as follows by Brand AJ in *Le Roux v Dey:*[273]

> *"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would, in turn, depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion, it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."*[274]

The test for wrongfulness is an *ex post facto* assessment of objective reasonableness involving a balancing act of all relevant circumstances including those not foreseeable by the actor, general reasonableness, the legal convictions of the community, the *boni mores*

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[270] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 75; Loubser & Midgley *The Law of Delict in South Africa* (2012) 140.
[271] Neethling, Potgieter & Visser *Deliktereg* (2014) 35; Van der Walt & Midgley *Principles of Delict* (2005) 70.
[272] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 72; *H v Fetal Assessment Centre* 2015 2 BCLR 127 (CC) 67; Loubser 'Unlawfulness in the South African law of delict: Focus areas in the debate' in Boezaart & De Kock (eds.) *Vita perit, labor non moritur, Liber memorialis* (2008) 117 at 143.
[273] 2011 (3) SA 274 (CC).
[274] [122].

and public policy.[275] The wrongfulness analysis is an open and structured process of judicial reasoning and the criteria applied in this process can be reduced to the following considerations:[276]

- Was a right of the plaintiff infringed? Harm actively caused to person or property is *prima facie* wrongful, whereas the causation of pure economic loss or emotional shock is not.
- Did the defendant breach a legal duty to the plaintiff not to cause harm or to prevent harm? The particular circumstances of the case may dictate that the defendant owed the plaintiff a duty. For example, where the defendant had control over a dangerous object or situation, the defendant was aware of danger, the defendant had professional knowledge, or the parties were in a relationship imposing responsibility on the defendant.
- Did the defendant breach a statutory duty to the plaintiff not to cause harm or to prevent harm? If the statute's aims are consistent with those of delictual liability, breach of statutory duty may establish wrongfulness.
- The nature of the defendant's conduct. Causation of harm by a positive act is more readily considered wrongful than harm caused by omission. Physical causation of harm is more readily deemed wrongful than verbal causation of harm.
- The nature of the defendant's fault or state of mind. Wrongfulness will logically be more easily established where the harm was caused intentionally as opposed to negligently. A motive to cause harm often points to wrongfulness.

[275] Boberg *The Law of Delict, vol 1* (1984) 269-270; Neethling, Potgieter & Visser *Deliktereg* (2014) 36, 40; Loubser & Midgley *The Law of Delict in South Africa* (2012) 144-145.
[276] Neethling, Potgieter & Visser *Deliktereg* (2014) 40-41; Loubser & Reid *Product Liability in South Africa* (2012) 42 and authorities cited.

In the context of product liability, wrongfulness would denote the unreasonable causing of harm by a defective product. By putting into circulation 'potentially harmful things', a manufacturer infringes the rights of others not to be exposed to danger without warning, which amounts to a breach of duty by the manufacturer to refrain from exposing the world so such 'hidden snares'.[277] The legal duty owed by a manufacturer is described by Van der Merwe and De Jager as:

> *"...a general duty to take reasonable steps to ensure that defective products do not reach the market or, if they do, to withdraw them from the market, or to take other steps to ensure that no harm ensues from the presence of the product on the market. The criterion of reasonableness coupled with the community's concept of what behaviour is reasonable in given circumstances is flexible enough to take into account such factors as the type of product, the nature of the manufacturer's business enterprise, the customs and practices prevailing in a particular trade or industry, the amount of knowledge and expertise of potential purchasers and users of the product, abnormal use, and the specific stage in the production process during which a defect originated. The last-mentioned factor may influence the duties of a manufacturer in different ways. At the stage of planning or design, the manufacturer must take into account the most recent knowledge available in his field."*[278]

If the harm caused by the product defect is purely economic, wrongfulness will depend on whether the defendant had a legal duty not to cause such harm, as the negligent causing of pure economic loss is not *prima facie* wrongful.[279] Whether a legal duty exists is matter for judicial discretion, involving considerations of public or legal policy consistent with constitutional norms.[280]

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[277] *Herschel v Mrupe* 1954 (3) SA 464 (A) referring to *Donoghue v Stevenson* [1932] AC 562, 1932 SC (HL) 31.
[278] Van der Merwe & De Jager 'Products Liability: A Recent Unreported Case' (1980) *SALJ,* 97 at 83, 88-89.
[279] *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at [38].
[280] Ibid, citing *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at [12]; Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 75.

Defectiveness of a product is considered by some authors to form part of, or to be inherently linked to the wrongfulness enquiry, as the harm resulting from the use of a product is not necessarily wrongfully caused.[281] It is argued that the concept of a 'defective product' plays a normative role in the process of assessing whether harm causing by the production and supply of a product should be branded wrongful.[282] In other words, a court would need to consider a harmful product from a hindsight perspective in an objective manner, taking into account the interests of the plaintiff, the defendant and society in general, when deciding whether a product is defective and for which liability should arise. Consider, for example, a pharmaceutical product which has certain side-effects or risks of harm, but nevertheless has great social utility. A court may hold in this case that the social utility of the product's medical benefits outweighs the product's risks and therefore, the harm suffered by a consumer of the product was not wrongful in the circumstances. If a court were to impose liability in these circumstances, manufacturers may cease to supply the product, thereby depriving society of its benefits. Linking product defectiveness to the element of wrongfulness is an important filter to liability so as to ensure an appropriate balance is struck between consumers, manufacturers and the interests of society at large.

At common law, no separate rules have crystallised in respect of different types of product defects. In *Herschel v Mrupe,*[283] the court referred to defective products as '*potentially harmful things'*. Nearly half a decade later, the Supreme Court of Appeal in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*[284] described a defective product causing harm as a 'potentially hazardous' product. It would be extremely difficult to draw a universally

[281] Neethling, Potgieter & Visser *Deliktereg* (2014) 344; Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' *Stell LR* 17 at 419.
[282] Loubser & Reid *Product Liability in South Africa* (2012) 40.
[283] 1954 (3) SA 464 (A).
[284] 2002 (2) SA 447 (SCA) par [64] at 470B-C/D and [66] D/E-G.

applicable dividing line indicating when products are so flawed that they should be considered 'defective' in a legal sense. Therefore, courts apply a flexible test for defectiveness, involving consideration of a range of relevant factors. As Van der Merwe & De Jager[285] explain, courts approach the defectiveness enquiry by applying general principles, essentially asking whether the product is 'unreasonably dangerous'. They argue that:

> *"The test is flexible enough to take into account such factors as the type of product, the nature of the manufacturer's business enterprise, the customs and practices prevailing in a particular trade or industry, the amount of knowledge and expertise of potential purchasers and users of the product, abnormal use, and the specific stage in the production process during which a defect originated. The last mentioned factor may influence the duties of a manufacturer in different ways. At the stage of planning or design, the manufacturer must take into account the most recent knowledge available in his field."*[286]

Specific factors relevant to the assessment of product defectiveness and wrongfulness, as outlined by Loubser & Reid,[287] may include:

- the production standards intended for the product by the manufacturer;
- production standards prescribed by legislation for the product;
- the possibility that the producer could reasonably have eliminated the harmful effect of the product by an alternative manufacturing process, design or otherwise, taking into account factors such as the risk, benefit, utility and cost of the product, and the proportionality of the risk of harm and the cost of prevention;
- the magnitude of the risk that the harm will materialise as a result of the product condition; and the possible extent of harm;

[285] Van der Merwe & De Jager 'Products Liability: A Recent Unreported Case' (1980) SALJ, 97 at 88.
[286] 88-89.
[287] *Product Liability in South Africa* (2012) 45.

- the way in which, and the purposes for which, that product has been marketed, packaged and displayed;
- any instructions for, or warnings in relation to the product;
- the use of any trade description or mark;
- the things that might reasonably be expected to be done with that product;
- the time when the product was manufactured and supplied.

These factors would of course have to be assessed from a hindsight or ex post facto perspective. It may be argued that consideration of the possibility of reasonably eliminating the harmful effect of the product amounts to the 'reasonable preventability' enquiry for purposes of establishing negligence. However, if this factor is considered objectively from a hindsight perspective having regard to general risk-utility factors, introduction of negligence-elements can be avoided in the defectiveness/wrongfulness enquiry.

The factors relevant to defectiveness in the wrongfulness enquiry and the respective weight carried by each factor would logically depend on the specific facts of each case and the nature of the product and defect alleged by the plaintiff. For example, in the case of an allegedly defective pharmaceutical product, the hazards of which require advanced scientific knowledge, magnitude of the risk of harm and the warnings and dosage instructions accompanying the product would carry much weight in the assessment.

A range of statutes and regulations set standards or benchmarks for product quality or safety. Examples of product types that are regulated by sector-specific legislation and regulations include foodstuffs, cosmetics and disinfectants,[288] agricultural products,[289]

[288] *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972.

fertilisers and farm feeds,[290] liquor,[291] meat[292] and medicines, related substances and blood products.[293] Contravention of statutory production standards is only relevant to the question of defectiveness and whether causing of harm was wrongful in the circumstances.[294] Unless it is clear that the intention of the statute as a whole is to impose strict civil liability for breach, a plaintiff will have to establish fault on the part of the defendant.[295]

The Supreme Court of Appeal in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd,* [296] a case involving an allegedly defective local anaesthetic, recognised that wrongfulness and defectiveness may present a considerable barrier to plaintiffs, even under a strict product liability system:

> *"As counsel for the respondent correctly pointed out, even if strict liability applied, a plaintiff would still have to prove not only that the product was defective when used but defective when it left the manufacturer's control. In the case of a medical product, for example, that burden would in any event probably require expert evidence involving, no doubt, some complexities of scientific analysis. It might also be difficult for a plaintiff to acquire for examination the remaining portions of the administered product or unused samples from the same consignment as that from which the administered product came. Moreover, there would be the same need to prove factual and legal causation as exists when liability is fault-based."*[297]

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[289] *Agricultural Product Standards Act* 119 of 1990.
[290] *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947.
[291] *Liquor Products Act* 60 of 1989; *Liquor Act* 59 of 2003.
[292] *Meat Safety Act* 40 of 2000.
[293] *Medicines and Related Substances Act* 101 of 1965; *National Health Act* 61 of 1947.
[294] Loubser & Reid *Product Liability in South Africa* (2012) 54-55.
[295] 55.
[296] 2003 (4) SA 285 (SCA).
[297] [19].

With respect to the relationship between wrongfulness and negligence, the test for both of these elements involves the application of a reasonableness standard.[298] Boberg explains the distinction between reasonableness in the context of wrongfulness and reasonableness in the context of negligence as follows:

> *"Where wrongfulness is in issue, the question is whether it was objectively unreasonable for the actor to bring about the consequence that he did, judged ex post facto and in the light of all relevant circumstances including those not foreseeable by the actor or beyond his control. Here the emphasis is upon the effect of the actor's conduct, and a finding of wrongfulness expresses the law's disapproval of the result that he produced. With negligence, on the other hand, the enquiry is whether the actor himself behaved unreasonably, judged in the light of his actual situation and what he ought to have foreseen and done in the circumstances that confronted him. Here the emphasis is upon the actor's role in bringing about a consequence that has already been branded wrongful, and a finding of negligence expresses the law's disapproval of the part that he personally played in producing it."*[299]

Boberg's analysis is disputed with respect to the idea that wrongfulness is always an *ex post facto* assessment, that is, assessment with a hindsight perspective.[300] For instance, Fagan[301] questions whether the legal duty in the context of wrongfulness is a duty not to cause harm or simply a duty not to be negligent. If it is the latter duty, then the elements of wrongfulness and negligence arguably overlap to a great extent.[302] If it is a duty not to cause harm, it is unclear how this duty should be framed in order to distinguish it from the negligence standard.

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[298] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 74; Loubser & Reid *Product Liability in South Africa* (2012) 50.
[299] Boberg *The Law of Delict, vol 1* (1984) 269-279.
[300] Fagan 'Rethinking wrongfulness in the law of delict' (2005) *SALJ*, 122 at 90; also Fagan *Negligence* in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in South Africa and Scotland* (2004) 498.
[301] 'Rethinking wrongfulness in the law of delict' 122 (2005) *SALJ* 90.
[302] Loubser *Unlawfulness in the South African Law of Delict: Focus area in the debate* in Boezaart & De Kock (eds) *Vita perit, labor non moritur, Liber memorialis* (2008) 117 at 133.

In the context of manufacturer's liability, the wrongfulness assessment has been bound up with the duty to refrain from "*putting into circulation potentially harmful things"*, as it was framed by the Appellate Division in *Herschel v Mrupe*.[303] The existence of this legal duty depends partly on the standard for defectiveness, which in turn depends, at least partly, on the proportionality of risk of harm and the cost of prevention of that risk.[304]

Courts in product liability cases have accepted that negligence is assessed based on what was reasonably foreseeable and preventable by the reasonable person in the manufacturer's position.[305] However, courts have not formulated the standard for wrongfulness in detail, being the standard for determining the existence of a legal duty for purposes of wrongfulness.[306] The reason for this may be that the focus in product liability cases has been predominantly on the question of negligence.[307]

Loubser & Reid[308] suggest that the basis for the distinction between the duty not to be negligent and the duty not to cause harm wrongfully can be inferred by analogy with cases involving liability of local authorities for failure to maintain public facilities or infrastructure, resulting in injury.[309] In these cases, negligence would be assessed based on what was reasonably foreseeable and preventable by a local authority, considering the reasonably attainable maintenance inspection procedures, the cost of repairs and the degree of risk and potential harm involved. For purposes of wrongfulness, the fact that the state of disrepair was not reasonably foreseeable by the local authority, perhaps due to

[303] 1954 (3) SA 464 (A); Loubser & Reid *Product Liability in South Africa* (2012) 51.
[304] Loubser & Reid *Product Liability in South Africa* (2012) 51, citing as an example of a proportionality analysis: *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) 361H/I-362A/B; 363C.
[305] Neethling, Potgieter & Visser *Deliktereg* (2014) 344-345; Boberg *The Law of Delict, vol 1* (1984) 194.
[306] Loubser & Reid *Product Liability in South Africa* (2012) 51.
[307] Ibid.
[308] 51-53.
[309] See, for example: *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Cape Town Municipality v April* 1982 (1) SA 259 (C); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA).

informational or organisational constraints, is not decisive. If the local authority had control over the infrastructure, had responsibility for its repair and the repair was physically and financially feasible, but the need for the repair was not reasonably foreseeable, then the failure to repair and prevent harm may be wrongful, but not negligent. Likewise, causing harm to an unforeseeable plaintiff could be considered wrongful, but not negligent.[310]

Building on this analogy, Loubser & Reid[311] suggest an "imputation of foreseeability" approach with respect to product liability. Pursuant to this approach, the harm caused by designing a potentially harmful product might not be reasonably foreseeable, however, based on a cost/benefit analysis and consideration of other factors relevant to determining wrongfulness, the harm may be regarded as reasonably preventable. It follows that the harm caused by the product in this instance could be considered wrongful, but not negligent, as reasonable foreseeability is a prerequisite for negligence.

The basis for this imputation of foreseeability approach draws on the so-called "imputation of knowledge" doctrine, which had some support in American product liability cases. The doctrine was applied by American courts with the aim of establishing a theoretical basis for strict liability by abandoning the requirement of foreseeable risk and imputing knowledge of danger or risk to the manufacturer.[312] Loubser & Reid[313] argue that a distinction between wrongfulness and negligence based on what they term the "imputation of foreseeability" approach could be applied in all product liability cases and may be of practical relevance when considering strict liability under the *Consumer Protection Act*.

[310] *Workmen's Compensation Commissioner v De Villiers* 1949 (1) SA 474 (C).
[311] *Product Liability in South Africa* (2012) 52-53.
[312] Miller & Goldberg *Product Liability* (2004) 365-366.
[313] *Product Liability in South Africa* (2012) 53.

It may be argued that the terminology of an imputation of "foreseeability" risks blurring the theoretical distinction between negligence and wrongfulness in that foreseeability falls squarely within the realm of the negligence element. In the context of a strict product liability regime, courts may therefore have a tendency to steer clear of any reference to negligence-related terminology such as foreseeability and preventability so as to emphasise the fundamental distinction between these two bases for liability. If, however, the imputation of foreseeability is understood properly as being an imputation based on a conclusion that the harm was reasonably preventable from a hindsight reasonableness perspective, it is arguably possible to apply this approach without reintroduction of a negligence element to the enquiry.

2.3.1.2 Defences in the context of product liability

2.3.1.2(i) Consent (*volenti non fit iniuria*)

According to the Roman and Roman-Dutch principle *volenti non fit iniuria,* consent can justify the causation of harm.[314] This principle applies equally to situations where a person consents to specific harm intentionally caused for a lawful purpose (e.g., medical procedures), as to situations where a person accepts the risk of harm associated with a dangerous activity (e.g. participation in a contact sport).[315]

Consent to intentional harm for a lawful purpose may provide a defence to a manufacturer where it can be shown that the consumer-plaintiff was willing to suffer the product's harmful side-effects in order to gain an overall health benefit.[316] Further, consent to the risk of harm, also referred to as voluntary assumption of risk, may provide a defence where the

[314] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 121; De Groot 3 35 8; Voet 47 10 4.
[315] Neethling, Potgieter & Visser *Deliktereg* (2014) 112-113; Van der Walt & Midgley *Principles of Delict* (2005) 140; *Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) 775.
[316] Loubser & Reid *Product Liability in South Africa* (2012) 148.

consumer was willing to run the risk of suffering potential side-effects of a product.[317] A consumer who deliberately ignores instructions or warnings accompanying a product or deliberately misuses a product, could be regarded as having voluntarily assumed the risk of harm.[318]

To succeed with the defence of consent, it must be shown that the plaintiff validly consented to the harm or risk of harm associated with the product. The characteristics and requirements for valid consent can be summarised as follows:[319]

- Consent can be given unilaterally by the plaintiff.
- Consent can be given verbally or tacitly by conduct. However, consent must be indicated externally in a clear, manifest way.
- Consent must be given prior to the occurrence of harm.
- The consenting party must be capable of expressing his or her will, i.e. the mental ability to understand his or her actions.
- Consent must be given without any moral, social or economic pressure.
- The consenting party must have full knowledge of the nature and extent of the harm or risk of harm.
- The consenting party must be subjectively willing to suffer the harm that will or may occur.

In the last instance, consent must be lawful in that it must align with reasonableness, the *boni mores* and legal convictions of the community.[320] For instance, consent to a form of

[317] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 121.
[318] See, for instance, examples discussed in Miller & Goldberg *Product Liability* (2004) par 17.111.
[319] Neethling, Potgieter & Visser *Deliktereg* (2014) 115 - 118; Loubser & Midgley *The Law of Delict in South Africa* (2012) 164 - 166.
[320] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 123; Loubser & Midgley *The Law of Delict in South Africa* (2012) 166.

harm that contravenes a statute would be contrary to the legal convictions of the community and unlawful.[321]

Where it can be shown that a manufacturer was negligent in supplying a defective product, courts are generally reluctant to accept that the plaintiff consented to the manufacturer's negligence.[322] While recognising consent as a defence in principle, courts are more inclined in these circumstances to view the plaintiff's voluntary exposure to the risk of harm as contributory negligence.[323] Damages can then be apportioned according to the extent of the plaintiff's contributory negligence in order to achieve a fair result.[324]

2.3.1.2(ii) Contractual exemption or limitation

A prior agreement not to claim damages for harm caused by the conduct of another, (*pactum de non petendo in anticipando)*, may preclude a plaintiff from recovering damages for harm negligently caused by a product defect.[325] This should be distinguished from consent, in that a *pactum de non petendo* is contractual whereas consent is unilateral conduct by the consenting person.[326]

A contractual provision that purports to exclude liability for harm intentionally caused would be contrary to public policy and invalid, whereas exclusion of negligence or even gross negligence may be valid.[327] It is worth noting that courts have questioned whether clauses

[321] Neethling, Potgieter & Visser *Deliktereg* (2014) 118.
[322] Van der Walt & Midgley *Principles of Delict* (2005) 140.
[323] Loubser & Reid *Product Liability in South Africa* 151; see also Miller & Goldberg *Product Liability* (2004) par 17.111.
[324] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 125.
[325] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 67; Neethling, Potgieter & Visser *Deliktereg* (2014) 119.
[326] Loubser & Reid *Product Liability in South Africa* 152.
[327] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 67; *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 807; *Masstores (Pty) Ltd v Roberts Constructions (Pty) Ltd* 2009 1 All SA 146 (SCA) 30.

excluding liability for negligent causation of personal injury or death are not invalid due to being contrary to public policy, informed by constitutional norms and values.[328]

In the context of product liability, a manufacturer may, as the law currently stands, supply a product pursuant to a sale agreement whereby it validly excludes liability for any negligence, or even gross negligence, on its part in respect of the production of a defective product, the quality control processes, the warnings, instructions or labelling information accompanying the product.

2.3.1.2(iii) Contributory responsibility

The *Apportionment of Damages Act*[329] *('ADA')* allows for apportionment of damages in cases where the defendant can show that another party or parties contributed to the harm suffered by the plaintiff. The co-contributor(s) may be the plaintiff (contributory negligence), other defendant or defendants (joint wrongdoers) or a combination of these.

Section 1(1)(a) of the ADA provides that a court may reduce damages "*to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage*."

In the context of product liability, contributory negligence may be raised, for instance, where a plaintiff misused a product, tampered with it, failed to maintain the product or ignored warnings or instructions accompanying the product. If contributory negligence is established, a court may reduce the amount of damages in accordance with the plaintiff's contribution to the harm.

[328] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 67, citing *Swinburne v Newbee Investments (Pty) Ltd* 2010 4 All SA 96 (KZD) 36 and the court's *obiter* comments regarding policy factors that would point to invalidity of such exemption clauses.

[329] 34 of 1956.

Section 2 of the ADA provides a right of recovery between concurrent wrongdoers. A court may apportion damages between concurrent wrongdoers on the basis of what the court deems '*just and equitable'*, having regard to the degree in which each joint wrongdoer was "*at fault in relation to the damage suffered by the plaintiff*."[330]

A plaintiff who is harmed by a defective product may choose to sue the manufacturer and another party or parties in the supply chain, such as the retailer or distributor of the product. If it can be established that more than one defendant contributed to the harm, they are joint wrongdoers, and a court will apportion damages in accordance with each defendant's contribution to the harm.

A case of joint wrongdoers may also arise where, for instance, a product incorporates various components, some or all of which the manufacturer sourced from other suppliers. If the cause of the product defect can be traced to a particular component, the manufacturer would seek to argue that the supplier of that component is partly at fault.

2.4 CONCURRENCE OF COMMON LAW ACTIONS FOR DAMAGES

In modern legal systems, the notion concurrence is generally understood in two senses.[331] In the 'broad' sense, it refers to the 'simultaneous applicability' of two or more legal rules to one factual situation.[332] Under this definition, the parties are not necessarily in a direct contractual relationship. Concurrence in the 'narrow' sense, or 'true' concurrence, occurs

[330] Sections 2(6)(a), 2(7)(a) & 2(8)(a).
[331] See Chapter 1, par 1.3.2. and discussion by Van Aswegen *Die Sameloop van Eise om Skadevergoeding uit Kontrakbreuk en Delik* (1991).
[332] Van Aswegen *Die Sameloop van Eise om Skadevergoeding uit Kontrakbreuk en Delik* (1991) 6-7 and authorities cited here; Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 63. For South African cases involving concurrence of actions in the narrow sense, see, for instance: *Van Wyk v Lewis* 1924 AD 438; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985* (1) SA 475 (A); *MEDIA 24 Ltd v Grob*ler 2005 (6) SA 328 (SCA); *SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 (4) SA 1019 (SCA); *Pinshaw v Nexus Securities (Pty) Ltd 2*002 (2) SA 510 (C); *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA).

where different legal rules apply to the same factual situation, between the same persons, and where those rules have similar aims and consequences.[333]

The controversial question posed by narrow contract/delict concurrence is whether a claimant can recover patrimonial loss resulting from breach of contract by means of a delictual action. In other words, when does the existence of a contract between the parties exclude an action in delict for patrimonial loss and when does an independent delictual duty not to cause such harm arise outside the contractual terms?[334]

Under South African common law, a plaintiff generally has a choice between claiming damages *ex contractu* or *ex delicto* where breach of contract results in the unlawful and culpable causation of harm, or he can institute these claims in the alternative.[335] However, the delictual remedy would only be available alternatively where the claimant can prove that a legally recognised interest, which exists independently of their contract with the defendant, has been unlawfully and culpably infringed.[336] This is known as the "independent delict test", essentially asking whether the defendant owed the claimant a duty of care outside the realm of their contractual relationship.[337]

Whether a court will recognise a concurrent delictual claim for damages within a contractual setting is a question of wrongfulness, asking whether general reasonableness, *boni mores*, the legal convictions of the community, and ultimately policy, dictate that a

[333] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 63.
[334] Loubser & Midgley *The Law of Delict in South Africa* (2012) 190.
[335] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 64; Neethling, Potgieter, Visser *Deliktereg* (2014) 279.
[336] Ibid. See *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute* 2000 1 SA 141 (D) 145; *Otto v Santam Versekering Bpk* 1992 3 SA 615.
[337] *Holtzhauzen v ABSA Bank Ltd* 2008 (5) SA630 (SCA).

concurrent duty of care exists in delict.[338] A number of key policy considerations can be gleaned from case law on this question.

The consideration of potential indeterminate liability becomes relevant where recognition of delictual liability would expose the defendant to a multiplicity of claims by an indeterminate number of plaintiffs, or a limited number of claims that are unable to be quantified.[339] In both cases, insurability is relevant. Where there is a risk of multiplicity of actions, the indeterminate volume of claims may render the risk of loss uninsurable at a reasonable cost.[340] Where an individual claim is unquantifiable, it is arguable that each plaintiff is best positioned to foresee the extent of its loss and protect itself adequately. The defendant would often not even be able to estimate the plaintiff's potential loss. The risk of opening the floodgates of liability is a particularly weighty factor in cases of pure economic loss.

Courts would be reluctant to recognise concurrent delictual liability where adequate alternative means of protection from the risk of loss were reasonably available to the plaintiff.[341] The question is whether the plaintiff could reasonably have been expected to protect itself by other means, such as contractual arrangements with third parties or by obtaining proper insurance cover.[342]

The most frequently cited policy consideration for excluding concurrent delictual liability is based on the notion that, where the parties' relationship is governed by contract, the law

[338] Loubser & Midgley *The Law of Delict in South Africa* (2010) 190.
[339] Stapleton 'Duty of care and economic loss: a wider agenda' (1991) *LQR*, 07 at 254.
[340] Hutchison & Van Heerden 'The contract/tort divide seen from the South African perspective' (1997) *Acta Juridica* 109-110.
[341] 111-112; Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 64.
[342] Hutchison & Van Heerden 'The contract/tort divide seen from the South African perspective' (1997) *Acta Juridica* 112.

should not superimpose a further form of liability as the parties had the opportunity to comprehensively regulate where the risk of loss lies.[343] Imposition of delictual liability may circumvent contractual terms governing arbitration of disputes and limitation of liability.

Courts have also raised concerns over legal uncertainty regarding the applicable standard of care against which a defendant's conduct should be measured where concurrent delictual liability is recognised. It is not entirely clear how the delictual standard of the *bonus paterfamilias* would be determined or whether it could be higher or lower than the contractual standard. From a commercial perspective, it may be undesirable to hold a party to a higher standard in delict than what he agreed to in contract.

Courts have recognised concurrent contractual and delictual claims in cases involving property damage or bodily harm.[344] Concurrent contractual and delictual actions are also possible in cases of pure economic loss, provided the delictual action is based on an independent duty not to cause such loss, as distinct from a duty deriving from the contract.[345]

2.5 CONCLUSION: Does the common law provide adequate protection for harm caused by product defects?

Van Eeden argues that, due to the particular requirements for establishing liability under common law remedies, many suppliers and manufacturers of defective products in South Africa have "*effectively enjoyed virtual immunity from liability for product defect claims*."[346]

[343] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA).
[344] Midgley et al 'Delict' in *LAWSA* vol 15, 3 ed (2016) 64; Loubser & Reid *The Law of Delict in South Africa* (2012) 192-193.
[345] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985* (1) SA 475 (A).
[346] *Consumer Protection Law in South* Africa (2013) 372.

As outlined in this chapter, the common law remedies available to persons who have suffered harm due to defective products are subject to numerous theoretical limitations in scope and present particular practical difficulties in obtaining redress, mainly due to demanding evidentiary burdens of proof in respect of causation, fault and defectiveness of products, exacerbated by the informational and financial imbalances existing between manufacturers and plaintiffs. The limitations and difficulties posed by common law remedies identified in this chapter are summarised as follows:

- Due to the doctrine of privity of contract, contractual damages claims for breach of contract or pre-contractual misrepresentation against the supplier of a defective product are only available to consumers who stand in a direct contractual relationship to the supplier. This excludes bystanders or other third parties who suffer harm as a result of a defective good sold to a consumer.
- Contractual privity prevents a consumer from bringing a claim directly against a manufacturer where the defective product was supplied to the consumer by a distributor or retailer further down the supply chain.
- Standard contractual warranties relating to the quality of products are often limited in scope given that they are determined solely by the party providing the warranty, as opposed to negotiation.
- It may be difficult for a purchaser to establish that there was an implied contractual warranty as to the quality of a product in the contract of sale. Courts are reluctant to imply tacit terms into contracts of sale and would only do so where necessary to give efficacy to the contract. Further, contracts of sale often expressly exclude any implied terms as to the quality of the product sold.
- Sellers often exclude the common law implied warranty that a product sold is free of latent defects by including a *voetstoots* clause in the contract of sale.

- Contractual claims for damages do not enable a consumer to recover damages for non-patrimonial harm, such as pain and suffering damages.
- In order to claim contractual damages for breach of contract, a plaintiff must establish factual and legal causation between the defective product sold and the harm suffered. It may not always be possible for a plaintiff to recover consequential damages by way of a contractual claim, as distinguished from harm caused directly by the product defect, as the consequential harm suffered may be too remote to satisfy the legal causation requirement.
- A contractual or delictual claim for damages may be precluded by a contractual exclusion or exemption clause.
- A contractual claim for damages may prove fruitless in circumstances where the seller is merely a retailer, importer or distributor of a defective product manufactured overseas and that retailer, importer or distributor is impecunious and uninsured.
- The remedies for pre-contractual misrepresentation by a seller that a product is free from defects are only available to the purchaser who was induced into the contract of sale by that misrepresentation. Third parties who are injured by a defective product have no contractual recourse against a seller who made a fraudulent or negligent misrepresentation as to the defect-free nature of the product.
- The aedilitian remedies are only available to consumers who stand in a direct contractual relation to the manufacturer or merchant-seller of the defective goods.
- The Aquilian action's requirements of fault and causation often presents a very difficult or impossible burden of proof for plaintiffs. This is particularly so in the case of products of a complex or technical nature. Plaintiffs are generally unfamiliar with the technicalities of production processes or the scientific knowledge or technology available at the relevant time. In practice, there is often a marked informational and

financial imbalance between plaintiffs and manufacturers in that manufacturers generally have more financial and informational resources available to produce expert evidence in their defence.

- A bystander who was injured by a defective product being used by another person may have difficulty establishing that the manufacturer of that product owed him or her a duty of care for purposes of negligence.
- While courts may assist a plaintiff by applying the *res ipsa loquitur* doctrine in cases where the facts justify an inference of negligence, judicial application of the *res ipsa loquitur* doctrine is limited in South Africa and is yet to be applied in a product liability case brought under the Aquilian action.
- Where the plaintiff had the opportunity to inspect the product prior to use, the foreseeability requirement may present difficulties in establishing negligence under the Aquilian action.
- Plaintiffs may be contractually precluded from claiming delictual damages for harm negligently caused by a product defect.
- Where the plaintiff stood in a direct contractual relationship with the supplier of a defective product, a court may refuse to allow a concurrent delictual claim for pure economic loss where the plaintiff is unable to show that the supplier owed an independent duty not to cause such loss, as distinct from a duty deriving from the contract.

In light of these limitations of, and difficulties posed by common law remedies, coupled with South African courts' refusal to develop delictual law to the point of recognising strict product liability, it is clear that the scope of protection afforded by the common law to persons harmed by defective goods was indeed inadequate, warranting statutory intervention.

CHAPTER 3

STRICT PRODUCT LIABILITY IN COMPARATIVE CONTEXT

3.1 INTRODUCTION

The aim of this chapter is to provide a comparative outline of selected foreign strict product liability regimes, focussed specifically on elements of these regimes which are relevant and applicable to the interpretation of the South African strict product liability regime introduced by section 61 of the CPA. In analysing the various possible interpretations of the section 61 provisions in Chapter 4 below, the study cross-references the relevant Australian, European and American legal developments in this field, as outlined in this chapter. A comprehensive review of the literature regarding the selected foreign regimes is beyond the scope of this study. Rather, the purpose of this chapter is to highlight and home in on selected elements of these regimes that are of particular relevance in light of the provisions and concepts incorporated into the CPA's product liability framework.

This chapter aims to offer a more detailed, focussed legal comparison of these foreign strict product liability regimes for the specific purpose of assisting South African courts and lawyers in the future interpretation and application of certain elements section 61, in addition to existing South African literature regarding product liability in general.

The majority of countries in which product liability has developed as a distinct field of law have sought to codify the core elements of liability.[347] Today, product liability in these jurisdictions generally rest on three building blocks: (a) special (mainly statutory) regimes creating liability for defective products; (b) general tort principles; (c) and contractual warranties.[348] The global trend toward improved consumer protection and strict, or stricter, product liability has resulted in the adoption of either free-standing product liability statutes,

[347] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *Am. J. Comp. L.* 51 at 759.
[348] 762.

more comprehensive consumer protection statutes or the introduction of special liability provisions to the general tort sections of civil codes.[349]

One of the key elements of a strict, no-fault product liability rule is the defectiveness standard against which products are measured. As Loubser & Reid[350] point out:

> *'Under a fault-based system, the negligence requirement acts as an important filter in the evaluative process to decide whether liability should be imposed. If the requirement of negligence is discarded to create strict liability, the question whether the product defect was reasonably foreseeable or discoverable is no longer relevant.'*

Generally speaking, strict liability requires proof of a product defect, damage, and the causal link between them. In the absence of negligence, the most important 'filter' to strict liability arguably becomes the standard against which products are measured to determine defectiveness. Although there is considerable variation in the formulation of the defectiveness standard, most legal systems rely on one of two broadly definable approaches:

- A consumer expectations standard, asking what persons are generally entitled to expect of a product's safety; or
- A risk-utility analysis, involving a broad balancing of all relevant factors asking whether the product risks outweigh its utility.[351]

With respect to the defectiveness standard, this chapter examines the 'consumer expectations test' as formulated in the European Directive on Product Liability, the

[349] 758.
[350] Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) *Stell LR* 17 at 422.
[351] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *Am. J. Comp. L.* 51 at 759.

interpretation of this standard in selected EU member states as well as the equivalent test contained in the Australian Consumer Law. This is contrasted with the widespread rejection of the consumer expectations standard in the United States in the context of design and inadequate warning or instruction defects in favour of a risk-utility analysis. The differences between these two standards are discussed below.

Apart from the concept of defectiveness, this chapter analsys further key aspects of these foreign strict product liability frameworks including the scope of parties liable, the potential claimants, the type of products and harm covered, the test for causation and the statutory defences available.

This chapter concludes by providing a summary of the main similarities and differences between these foreign product liability frameworks as well as useful principles and insights that can be gleaned from foreign case law regarding the interpretation and application of these frameworks. As noted above at 1.4.1, when conducting applied comparative research, it is important to remain conscious of the fundamental differences in legal traditions of other jurisdictions and the unique policy contexts which have shaped the comparative legislative instruments in those jurisdictions.

3.2 UNITED STATES

3.2.1 The US Restatement (Third) of Torts: Products Liability 1998

In the late 19th century, a growing trend to impose strict warranty or negligence liability on commercial sellers of defective goods emerged in numerous states across America.[352] The consumer, whose main obstacle in succeeding with a negligence claim being the

[352] *Restatement (Third) of Torts: Products Liability*, section 1, comment (a).

burden of proving fault, was increasingly aided by a flexible application of *res ipsa loquitur*.[353] Although the defendant could, in theory, rebut the inference of negligence by showing that the harm caused by the defective product was not avoidable by exercising reasonable care, such cases were by the 1960's considered "so extremely rare as to be negligible."[354] Although courts insisted they were using negligence standards, liability in tort became increasingly strict.

Notwithstanding proof that all possible care had been exercised in the preparation and distribution of the goods, sellers could nevertheless be held liable on the faultless basis of warranty. However, given that strict warranty liability is ring-fenced by the requirement of contractual privity, third parties to a particular agreement, such as family members or employees of the purchaser of a product, were precluded from bringing actions for contractual damages. As a result of this doctrinal barrier, American courts in the early 1900's began to depart from classical warranty theory.[355] The majority of state jurisdictions followed the rule in *McPherson v Buick Motor Co*.,[356] in which the New York Court of Appeals held *"there is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use."*

Contrary to the doctrinal rule, vertical non-privity plaintiffs were for the first time allowed to sue the manufacturer of a faulty product on the basis of an implied warranty.[357] Later, in

[353] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 593. See, for example, *Escola v Coca-Cola Bottling Co. of Fresno* (1944) 150 P2d 436.
[354] Prosser 'The Assault upon the Citadel' (1960) *Yale Law Journal* 69 at 1115. Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 593.
[355] Geistfeld *Principles of Product Liability* (2011) 14.
[356] 1916 217 NY 382, 111 NE 1050.
[357] Stapleton 'Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective' (2000) *Washburn Law Journal* 39 at 366, citing *Mazetti v Armour & Co* 135 P 633 (Wash.1913).

Henningsen v Bloomfield Motors Inc[358] abandonment of privity also extended horizontally in favour of consumers who fell entirely outside the contractual chain of supply.[359] The court held that:

> *"…where the commodities sold are such that if defectively manufactured they will be dangerous to life and limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer...[384] Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. The absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial."*[360]

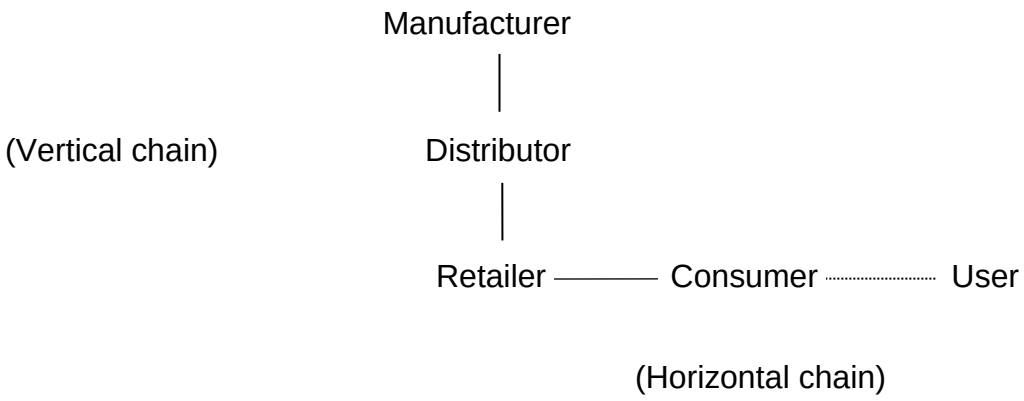

Fig. 1 *Vertical and horizontal chains of supply*[361]

By the early 1960's, American courts were generally of the opinion that sellers of defective products should be liable for harm caused, regardless of whether a warranty or negligence claim could be maintained.[362] In the landmark judgment of *Greenman v Yuba Power*

[358] 32 N.J. 358,161 A.2d 69 (N.J.1960).
[359] Stapleton 'Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective' (2000) *Washburn Law Journal* 39 at 366.
[360] 379.
[361] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 608.
[362] Restatement (Third) of Torts: Products Liability, section 1, comment (a).

Products Inc,[363] the Supreme Court of California, faced once again with a warranty claim in relation to a defective product, chose to abandon the language of warranty altogether and to impose instead upon the manufacturer a general strict liability in tort. The Court acknowledged that:

> *"although strict liability has traditionally been based on an express or implied warranty given by the manufacturer, the fact that the contractual nexus requirement has been abandoned, the recognition that liability for defective products does not arise from an agreement but is imposed by law and the refusal to allow the manufacturer to define the scope of its liability for defective products make it clear that product liability is not governed by the law of contractual warranties but by the law of strict liability in tort."*[364]

Leading up to this decision, it had already been widely thought that many courts were, under the guise of negligence, holding manufacturer strictly liable in tort for injury caused by manufacturing defects.[365] This, it was believed, resulted from a combination of an exceptionally high standard of care, vicarious liability, and a flexible application of *res ipsa loquitur,* making it nearly impossible for manufacturers to succeed with exculpatory defences.[366]

In short, the American movement toward strict liability for defective products was driven along two routes.[367] The courts' apparent dissatisfaction with traditional negligence and warranty remedies led, initially, to an extension of warranty liability beyond the borders of privity, and later, to a gradual rising in the strictness of negligence liability up to the point, in the early 1960's, where it was judicially proclaimed to be strict liability in tort.[368]

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[363] 377 P 2d 897 (1963)
[364] 901 (Traynor J).
[365] Stapleton 'Product Liability, an Anglo-Australian Perspective' (2000) *Washburn Law Journal* 39 at 381.
[366] Ibid.
[367] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 594.
[368] Ibid.

The next logical step was to regularise this novel strict liability in tort by drafting a broad liability rule that would guide courts in its application. To that effect, the American Law Institute published the *Restatement (Second) of Torts,*[369] containing in section 402A a model version of strict tort liability, which was adopted by the majority of American jurisdictions at the time.[370] Strict liability in tort would, as the Reporters of the *Restatement (Third)* phrased it, "*merge the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required*."[371]

Liability in terms of section 402A was based on the core notion of a product which reached the consumer "*in a defective condition unreasonably dangerous*." In comment (i) to section 402A, the *Restatement (Second)* introduced a test for defectiveness, which reads that "*the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."*

Although it was argued by some that section 402A's use of wording such as 'unreasonably dangerous' seems to essentially utilise negligence rhetoric, it was maintained that the focus here is on whether the product was unreasonably hazardous from the viewpoint of the consumer and not on the blameworthiness of the manufacturer's conduct.[372]

The formulation of comment (i) was utilised by a number of American courts as the basis for applying what came to be known as the 'consumer expectations test' for

[369] (1965).
[370] Geistfeld *Principles of Product Liability* (2011) 17; Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 598.
[371] Restatement (Third) of Tort: Products Liability section1, comment (a).
[372] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 599.

defectiveness.[373] Regrettably, and for reasons that will be discussed later in this chapter, this legal standard proved unsuitable as a controlling test for product defectiveness and attracted severe academic criticism. It is therefore hardly surprising that this test was rejected by the Reporters in the subsequent *Restatement (Third)* as an independent measure of defect.

Furthermore, comment (i) allowed courts to develop a separate 'risk-utility defence', over and above the numerous defences that were provided for in section 402A.[374] Particularly in the context of design defects, this 'risk-utility defence', comprising a balancing of the costs and benefits of product innovation on society, not unfamiliar to the negligence lawyer, was developed by the courts to avoid a situation of absolute liability.[375] As regards specifically listed defences under section 402A, comment (g), for example, exempted the defendant from liability if he "*delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed.*"

In addition, manufacturers of what was termed 'unavoidably unsafe products', mainly aimed at prescription and high-risk pharmaceutical products, could escape strict liability in terms of comment (k), provided these products were properly prepared and marketed, and adequate warnings were given. This defence was justified on the grounds of utility: a manufacturer should not be liable for seeking to provide the public with an 'apparently useful and desirable product, attended with a known, but apparently reasonable risk'. In its

[373] Ibid.
[374] Ibid.
[375] Birnbaum 'Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence' (1980) *Vand.LR* 33 at 593, 600.

very first form, section 402A essentially represented a strict tort liability regime, tempered with negligence elements and extensive provision for defences.[376]

With the introduction of the *Restatement (Third) of Torts*, section 402A was replaced by a new formulation of liability. One major change brought about by the *Restatement (Third)* is the differentiation between types of defects. Manufacturing defects, design defects and products which are defective due to inadequate instructions or warnings are dealt with separately under section 2 and accorded varying forms of liability. The second important departure from the *Restatement (Second)* was the clear and unequivocal rejection of the consumer expectations test as a controlling standard for defect,[377] and the replacement thereof with multiple definitions of defect, set out in section 2, comment (e) to section 2, as well as sections 3 and 4, and special standards of liability for certain product groups, such as prescription drugs and medical devices[378] and food products.[379]

Understanding the *Restatement (Third)*'s formal status within the legal environment which it seeks to inform, or reform, is pivotal prior to a discussion of its substantive provisions. In essence, restatements are of mere advisory value to state legislatures and courts and their formulation tends to be strongly influenced by stakeholder interests on both sides of a debate.[380] It is not entirely certain which approach to codification restatements should adopt. The *Restatement (Second)* followed an 'outer rim' approach to codification, i.e. reflecting the maximum liability that has been imposed by courts in an area. In contrast, the Reporters describe the *Restatement (Third)* as a recording of the 'consensus' position,

[376] Conk 'Is there a Design Defect in the Restatement (Third) of Torts: Products Liability?' (2000) *Yale Law Journal* 109 at 1094.
[377] Comment (g).
[378] Section 6.
[379] Section 7.
[380] Stapleton 'Product Liability, an Anglo-Australian Perspective' (2000) *Washburn Law Journal* 39 at 371.

indicating where the *weight* of authority in a particular area lies.[381] As Stapleton[382] argues, both approaches may be misleading to courts. For instance, if courts mistakenly misread the 'outer rim' approach as reflecting the consensus position on a matter, a restatement could encourage expansionist legal reform. Conversely, the 'consensus' approach may be misinterpreted by courts as reflecting the outer borders of liability, thereby effecting a "*retrenching dynamic of legal change*."[383]

Regardless of the reformist impact it may have had until now, the *Restatement (Third)* reflected, at the time of its introduction, a clear and continuing change of course in American strict product liability principles.[384] Courts had been, for quite some time, relying increasingly on a risk-utility standard for defectiveness, in apparent preference to a test based on consumer expectations.[385] There had been marked relaxation of the strict-liability requirements of the 'state of the art' defence in many states, and courts had gradually become more inclined to limit the scope of manufacturers' liability.[386]

Empirical studies conducted on appellate court judgments show that plaintiffs' success rate in product liability claims began to decline steadily by the early 1980's.[387] Whereas initially, consumer protection was the main driving force for the imposition and institutionalisation of strict product liability in the 1960's, the American regime has become

[381] 372.
[382] Ibid.
[383] Ibid.
[384] Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 604.
[385] Ibid. Courts, however, denied that this reverts to negligence standards, as the focal point of judgment is the product itself rather than the conduct of the manufacturer.
[386] 605.
[387] Geistfeld *Principles of Product Liability* (2011) 3; Deakin, Johnston & Markesinis *Markesinis and Deakin's Tort Law* (2012) 606. These studies, conducted by Professors Henderson and Eisenberg, indicate that courts were becoming increasingly pro-defendant, by dismissing claims pre-trial on questions of law, thereby preventing judgment by juries, who are traditionally more pro-plaintiff. See: Henderson & Eisenberg 'The Quiet Revolution in Products Liability' (1991) *Anglo-American Law Review* 20 at 188.

noticeably more conservative over the last two and a half decades, arguably in an effort to increase industry protection against allegedly overblown liability rules.[388]

3.2.1.1 Parties liable

The *Restatement (Third)* imposes liability upon a broad range of defendants, including commercial sellers and distributors. In terms of section 1, *"one who is engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect*."

This would therefore include manufacturers and commercial sellers/retailers, distributors/wholesalers and importers of defective goods into the US. Among the reasons cited by the Reporters[389] for extending liability to all actors in the distribution chain is the belief that wholesalers and retailers are in a better position than individual consumers and users, to absorb the risks of defective products, and that they will, in turn, be able to recover liability costs from the manufacturer. Moreover, due to the sometimes extended nature of modern supply chains, plaintiffs regularly face procedural challenges in joining manufacturers in product claims. A further argument in favour of this inclusive category of defendants is that, by holding wholesalers and retailers strictly liable, the interests of users and consumers will be better protected, in the sense that the former will be encouraged to deal only with trustworthy and financially responsible manufacturers and distributors capable of indemnifying them from liability.

[388] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) *AmJCompL* 760.
[389] Section 2, comment (a).

3.2.1.2 Potential claimants

Section 1 of the *Restatement (Third*) simply refers to harm to 'persons or property'. In section 3, reference is made to harm sustained by the 'plaintiff''. In other words, any person who suffers harm due to a defective product is arguably entitled to bring a claim against the commercial seller or distributor.

Section 21 defines "harm to persons or property" in the context of recovery of economic loss to include any economic loss caused by "*harm to the plaintiff's person"* or *"the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law."* In other words, this section confirms that plaintiffs may also be dependants of a person who is physically harmed by a defective product.

3.2.1.3 Goods

Section 19 of the Restatement (Third) defines a 'product' as follows:

> *"(a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.*
>
> *(b) Services, even when provided commercially, are not products.*
>
> *(c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement."*

The Restatement (Third)'s definition of "product" is essentially restricted to tangible goods, however, a few types of intangible goods have attracted strict liability. The majority of American jurisdictions have held that, once electricity has been distributed to the

consumer through the meter, it is subject to strict product liability.[390] A minority of courts have declined to impose strict liability in the context of electrical injuries on the basis that the provision of electricity is a service.[391] A number of American courts have held that high-voltage electricity is not subject to product liability as the high-voltage electricity has not yet been converted to a form for delivery to a consumer.[392] For instance, if a plaintiff comes into contact with a high-voltage distribution line, product liability does not apply, however, the electrical supplier may be negligent in relation to the manner in which the electricity was distributed, for instance, by an uninsulated or low-hanging distribution power line.

The definition of "product" does not refer to component products, however the Restatement (Third) provides specifically for liability of commercial sellers or distributors of defective product components for harm caused by another product into which that defective component was integrated. The majority of American courts do not consider property in the form of information to be a "product." The reason for this is that courts are concerned from a policy perspective that imposition of strict liability for the distribution of false or defective information would encroach considerably on free speech.[393]

While the definition of "product" is silent on whether second-hand goods are included, any second-hand tangible good that is "*distributed commercially for use or consumption*" would arguably qualify as a "product".

[390] Standler 'Legal Liability for Electricity in the USA: Products Liability' (2011) 11. Available [online]: www.rbs2.com/utility.pdf.
[391] 28.
[392] 11.
[393] Restatement (Third) section 19, comment (d).

3.2.1.4 Causation

Section 15 of the Restatement (Third) provides a general rule regarding the causal connection between a product defect and harm as follows:

> *"Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort."*

Causation in US tort law involves two enquiries, namely the factual cause of the injury and the legal/proximate cause of the injury (based on policy considerations), both of which are determined by a jury. A review of the general principles governing causation in American tort law is beyond the scope of this study. However, a few brief comments are warranted in relation to the impact of the causation requirement on strict product liability.

In relation to factual causation, a plaintiff is required to prove, by a preponderance of the evidence, that the harm would not have occurred 'but for' the product defect. [394] The plaintiff must show that the defect is capable of causing the general type of harm suffered (general causation) and the particular harm in question (specific causation) and the fact that the defect was present in a product commercially distributed by the defendant (individualised causation). [395] Plaintiffs have had difficulty establishing all of these elements, either due to the nature of the accident, the defect or the product.[396]

US courts have recognised a so-called "material contribution to risk" rule in the context of asbestos-related cancer claims where there is a single wrongdoer. Under this rule, plaintiffs need only show that exposure to the defendant's asbestos products was, in

394 Geistfeld *Principles of Product Liability* (2011) 201.
395 Ibid.
396 Ibid.

reasonable medical probability, a substantial factor in contributing to the risk of developing cancer.[397]

With its roots in the law of negligence, section 3 of the Restatement (Third) fulfils a function analogous to the *res ipsa loquitur* doctrine by allowing an inference of defect to be drawn when justified by the facts of the harm-causing incident.[398] According to section 3:

> *"It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:*
>
> *(a) was of a kind that ordinarily occurs as a result of product defect; and*
>
> *(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution."*

Although this provision is occasionally applied in cases involving a design defect, the majority of cases brought under this section involve alleged manufacturing defects.[399] The Reporters make it clear that application of this section is restricted to cases where the product to failed to perform its manifestly intended function, thereby lending support to the conclusion that a product defect is the most likely explanation for the harm caused.[400] The malfunction theory or doctrine, as some courts refer to it, 'permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes…'[401] Since the plaintiff is not required to prove the specific nature of the defect that resulted in this malfunction, defectiveness can be established without meeting the requirements for a defect under

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[397] *Rutherford v Owens-Illinois Inc* (1997) 16 Cal. 4th 953; *Kennedy v Southern California Edison Co*, 219 F. 3d 988 (9th Cir. 2000).

[398] See also the *res ipsa loquitur* section contained in the Restatement (Second) of Torts, section 328D.

[399] Section 3, comment (b).

[400] Ibid.

[401] *Harkins v Calumet Realty Co*, 614 A.2d 699, 705 (Pa.Super.Ct.1992).

section 2.[402] The court in *Sanders v Quikstak Inc*[403] summarises the position as follows:

> *"Under certain circumstances, however, a plaintiff need not prove a specific defect in the product at issue. Despite an absence of proof of any specific defect in a product, a jury may infer that an accident occurred because of a defect when the plaintiff has proven that the product did not perform as intended and has excluded all causes of the accident not attributable to the defendant."*

Along the same route, some courts recognise that there may be products or categories of products that pose 'inherently unreasonable risks' for which strict liability should attach, regardless of the exact nature of the defect. In *Phipps v General Motors Corp,*[404] a Maryland court explains that "*there are those kinds of conditions which, whether caused by design or manufacture, can never be said to involve a reasonable risk."* Such products are therefore held to be defective and unreasonably dangerous without having to weigh and balance the factors involved.

3.2.1.5 Harm and damages

Section 1 of the Restatement (Third) imposes liability for 'harm to persons or property'. This is expanded in Section 21 where the Restatement (Third) provides that 'harm to persons or property' includes economic loss if caused by harm to:

> *"(a) the plaintiff's person; or*
> *(b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or*
> *(c) the plaintiff's property other than the defective product itself."*

[402] Comment (c). See, for example, *Andersen v Chrysler Corp* 403 S.E.2d 189 (W.Va.1991); *Henderson v Sunbeam Corp*. 46 F.3d 1151 (10th Circuit 1995).
[403] 889 F.Supp.128,131 (S.D.N.Y. 1995).
[404] 363 A.2d 955 (Md. 1976).

The Restatement (Third) excludes harm to the defective product itself. As noted above, the wording of section 21(b) indicates that a claim can be brought by dependants of a person who is harmed by a defective product, for loss of financial support.

With respect to section 21(c), courts in a strong majority of states have held that any consequential financial loss resulting from damage to the effective product itself, cannot be recovered under the Restatement (Third), pursuant to the so-called "economic loss rule."[405] The reason for this rule is that pure economic loss caused by a defective product "*is essentially the failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law*."[406]

Some jurisdictions allow for the recovery of punitive damages in product liability cases. The state laws governing punitive damages and the recovery limits vary from state to state.[407]

3.2.1.6 Concept of Defectiveness

Instead of providing a single definition for defectiveness, the Restatement (Third) has opted for a trifurcated formulation. Section 2(a) to (c) defines and sets out the liability standard separately for manufacturing, design and inadequate instructions or warnings defects. While true strict liability applies to manufacturing defects in terms of section 2(a), the Reporters explain that this is not suitable for design defects and inadequate warning defects, since the *rationale* for liability in the latter two cases are fundamentally different.[408] For these types of defect, 'some sort of independent assessment of advantages and

[405] Restatement (Third) Section 21, comment (d); Sudzus & Carroll 'Product Liability 2016 - USA' (2016) *International Comparative Legal Guides* at 6.2.
[406] *East River S.S. Corp. v Trans-America Delaval* 476 U.S. 858, 870 (1986).
[407] Sudzus & Carroll 'Product Liability 2016 - USA' (2016) *International Comparative Legal Guides* at 6.4.
[408] Section 1, comment (a).

disadvantages, commonly referred to as 'risk-utility balancing' is necessary'.[409] Although many courts insist on phrasing it as strict liability, the law according to the *Restatement (Third)* has returned in the case of design and warning defects to a type of reasonableness test closely resembling the enquiry into the negligent conduct of a defendant.[410]

Section 2(a) to (c) contains a set of 'functional criteria' for each of the three main types of defect which, if met, gives the plaintiff the option of bringing his product claim in terms of the rules of negligence, strict liability, the provisions of implied warranty of merchantability contained in the Uniform Commercial Code, or simply in terms of the applicable legislation.[411] Although the majority of claims are brought on the basis of these criteria, section 2 does not provide the exclusive means of establishing defectiveness in terms of the Restatement (Third).

In cases where the product failed to perform its manifestly intended function, the plaintiff may circumvent the evidentiary burden of section 2 by relying on a type of *res ipsa loquitur* rule, as restated in section 3, more commonly known as the 'malfunction doctrine.'[412] Many state jurisdictions included such a provision in their product liability statutes or have judicially recognised the possibility of allowing the plaintiff to present circumstantial evidence which could warrant the inference of defect.

Further, pursuant to section 4, a design defect or inadequate instructions or warnings defect may be established where the plaintiff succeeds in proving that the product does not comply with an applicable product safety statute or administrative regulation.

Particularly in the context of design defect cases, comment (e) read with the criteria for

409 Ibid.
410 Ibid.
411 Geistfeld *Principles of Product Liability* (2011) 81.
412 Owen '*Manufacturing Defects'* (2002) S.C. L. Rev. 851,873.

defective design contained in section 2(b), allows plaintiffs in some cases to argue that a certain product design was so 'manifestly unreasonable' that it should never have been marketed in the first place. If the plaintiff succeeds in this, he is relieved from proving the section 2(b) requirements for establishing design defect.

It is worth noting that the Restatement (Third) contains special provisions for establishing defectiveness in the case of certain product classes, including component products,[413] prescription drugs and medical devices,[414] food products[415] as well as used products.[416]

Owen[417] argues that, while the Restatement (Third) accurately restates the strict liability standard for defectiveness that courts have been applying in the context of manufacturing defects, it fails to provide suitable definitions for design and warning defects. He describes the current formulations as *"structurally awkward and unduly complex, a condition which promises to continue the kind of confusion that has plagued the application of section 402A in the courts."* Owen points out that courts in design and warning cases are applying a reasonableness standard which in reality is nothing but "*negligence, wrapped in a strict liability shroud.*"[418]

In Stapleton's view, the Restatement (Third) sacrifice analytical clarity in order to 'send messages' by means of format and that in doing so, it risks diminishing the influential value

[413] Section 5.
[414] Section 6.
[415] Section 7.
[416] Section 8.
[417] Owen 'Defectiveness Restated: Exploding the 'Strict' Products Liability Myth' (1996) *U. Ill. L.Rev* 743.
[418] 744.

of the Restatement (Third).[419] She proposes a more user-friendly analytical sequence for determining defectiveness under the Restatement (Third):[420]

i. Did the product fail to fulfil its manifestly intended function?[421] If yes, no proof of a RAD is required, and an inference of defect is drawn.
ii. Did the product fail to comply with a relevant product safety statute or administrative regulation?[422] If yes, no proof of a RAD is required.
iii. Was the product's design manifestly unreasonable?[423] Provided the relevant jurisdiction allows such a 'categorically defective design' category', proof of a RAD is irrelevant.

If none of the above cases applies, the court turns to the three categories of defect contained in section 2:

iv. Does the product have a manufacturing defect?[424]
v. Is the product defective in design?[425] (Proof of a RAD is required.)
vi. Is the product defective due to inadequate instructions or warnings?[426]

From this analytical sequence, it is clear that the Restatement (Third) provides at least six ways in which to establish defectiveness, and more importantly, that section 2(b) represents a class of defect that is resorted to only when none of the bases for defectiveness in (i)-(iii) apply.

[419] Ibid.
[420] 387.
[421] Section 3.
[422] Section 4.
[423] Section 2, comment (e).
[424] Section 2(a).
[425] Section 2(b).
[426] Section 2(c).

3.2.1.6 (i) Manufacturing Defects

The Restatement (Third) imposes strict liability where the plaintiff can prove that a manufacturing defect existed in the product at the time that product left the hands of the manufacturer or any seller in the supply chain. In terms of section 2(a):

> *"A product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;"*

Liability for manufacturing defects is premised on the deviation of a product from the design it was intended to conform to, and evidence regarding the safety controls or care taken by the manufacturer or seller will not serve as a defence. The product unit in question is measured against the manufacturer's own design standards and specifications for that product line. In *Barker v Lull Engineering Co*[427] the Californian Supreme Court defined a product containing a manufacturing defect as one that *"differs from the manufacturer's intended result or other ostensible identical units of the same product line."*

The manufacturer's design is not questioned in manufacturing defect cases, merely the specific product unit's conformance to that design. This was clearly formulated in *Banks v ICI Americas Inc*[428] where the court stated that in a manufacturing defect case "*...it is assumed that the design of the product is safe and had the product been manufactured in accordance with the design it would have been safe for consumer use*." Support for this definition of manufacturing defectiveness can be found in numerous state laws. For example, a Louisiana statute[429] considers a manufacturing defect to be present when a *"product deviated in a material way from the manufacturer's specifications or performance*

[427] 573 P.2d 443,454 (Cal. 1978).
[428] 450 S.E. 2d 671, 673 (Ga. 1994)
[429] L.a. Rev. Stat. Ann. section 9:2800.55 (West 1988)

standards for the product or from otherwise identical products manufactured by the same manufacturer."

It is quite possible that the manufacturing defect only surfaces after it has left the manufacturer's control, for example during transportation or storage. In these cases, the distributor or retailer can be held liable provided sufficient proof is given that the defect existed in the product when it left their hands.[430]

As noted above at 3.2.1.4, the plaintiff may be able to prove a manufacturing defect in certain circumstances where it is not possible to provide direct proof of the defect, for instance, where the product is destroyed in an accident. Section 3 may assist plaintiffs in these cases by inferring defectiveness from circumstantial evidence of the malfunction, provided the malfunction occurred during normal use and the product had not been altered or misused.[431]

3.2.1.6 (ii) Inadequate Warnings or Instructions

A product is defective in terms of section 2(c) when the manufacturer or any subsequent product seller failed to give reasonable instructions for safe product use or warnings of potential product hazards. Section 2(c) adopts a reasonableness standard that basically mirrors the section 2(b) standard for design defectiveness, stating that a product:

> *"is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe."*

430 Section 1, comment (e).
431 Owen '*Manufacturing Defects'* (2002) S.C. L. Rev. 851,873.

As a general rule, the manufacturer or seller's duty to inform or warn about inherent risks accompanying a product arises whenever a reasonably foreseeable consumer or user would consider such risks material in deciding whether to use the product or not.[432] It was in warning defect cases that courts for the first time acknowledged that the duty to warn of product risks only arises where those risks were foreseeable and that liability for failure to warn or instruct should be based on principles of negligence rather than strict liability.[433]

The duty to warn normally does not extend to obvious and generally known risks. According to the Reporters' *comment (j)* to this section, the inclusion of warnings about risks that are knowable through common sense would seldom result in a higher level of product safety, and could even cause consumers to start disregarding warnings, the obvious danger being that they could contain information on non-obvious risks as well.

Although the manufacturer is arguably best positioned to provide instructions and warnings relating to its product, the *Restatement (Third)* imposes on subsequent sellers a duty to warn or instruct whenever it is "feasible and reasonably necessary," and they will be held liable for inadequate manufacturer instructions or warnings.[434]

The Reporters acknowledge that there is no such thing as a perfect level of detail and that product warnings or instructions can hardly ever include all the information that could possibly be relevant to product use.[435] In evaluating the reasonableness of the instructions or warnings, a number of factors are balanced by courts, including content and

[432] Comment (i).
[433] See, for example: *Feldman v Lederle Labs* 479 A.2d 374 (N.J.1984) and *Brown v Superior Court* 751 P.2d 470 (Cal.1988), both dealing with warnings accompanying prescription drugs. See also: *Anderson v Owens-Coming Fibreglas Corp*. 810 P.2d 549 (Cal.1991), a case involving asbestos, in which the court extended the negligence-based liability for failure to warn of foreseeable risks to all products.
[434] Comment (i).
[435] Ibid.

comprehensibility, intensity of expression and characteristics of expected user groups.[436] Geistfeld[437] argues that the level of information to be provided to consumers should be considered in terms of the information costs associated with providing that information. He argues that more information is not necessarily better. If consumers are overloaded by information which they believe is not worthwhile reading, they will stop reading.

In some cases, particularly involving pharmaceutical products and medical devices, American courts recognise a so-called 'learned intermediary' doctrine. Pursuant to this doctrine, a manufacturer may escape liability by establishing that it had provided all necessary product information to a 'learned intermediary', such as a treating physician, who then interacted directly with the consumer. This doctrine relies on the presumption that the services and advice of the learned intermediary are required before a consumer may receive the product (e.g. a prescription for medication).[438] This doctrine has been adopted by a majority of states in the US.

In cases where a manufacturer or seller supplies a product which he knows will be made available for use by an intermediary to ultimate users, section 2(c) of the *Restatement (Third)* may require that instructions or warnings be given directly to these ultimate users. Whether the supplier can rely on the intermediary to warn or instruct the ultimate user, is once again a question of reasonableness, for which the Reporters cite factors such as the gravity of the risks posed by the product, the likelihood that the intermediary will warn or instruct the ultimate user regarding the risks and the feasibility and effectiveness of giving a warning directly to the ultimate user. Geistfeld argues that factors such as the reliability

[436] Ibid.
[437] Geistfeld *Principles of Product Liability* (2011) 81. See also, generally: Rheingold & Feinglass 'Risk-utility analysis in the failure to warn context' (1997) 30 *U. Mich. J. L. Reform* 353.
[438] *Reyes v Wyeth Labs* 498 F.2d 1264, 1276 (5th Cir. 1974).

or sophistication of the intermediary may also be relevant to the risk-utility analysis here.[439] He argues that, while the appropriate warnings may have been communicated to the intermediary, mistakes are inevitable and the intermediary may forget about certain risks.[440]

There has been a trend in a minority of states to erode the learned intermediary doctrine in the case of so-called 'direct-to-consumer' advertising.[441] The reasoning is that, where a pharmaceutical manufacturers advertises its products directly to consumers, they owe an additional duty to warn consumers of product risks and cannot rely on the learned intermediary defence as a complete defence.

Highlighted as a special category of products, *comment (k)* sets out the warning requirements for products that may cause "adverse allergic or idiosyncratic reactions." While prescription pharmaceuticals are dealt with separately in section 6, this category covers an extremely wide range of products, including non-prescription pharmaceuticals, cosmetics, food, toiletries, paint, solvents, building materials clothing and furniture. According to the Reporters, courts generally seem to require warnings whenever the evidence shows that a "substantial number of persons are allergic" to the product or the allergen it contains.[442] This quantitative burden of proof is qualified by one factor: the more severe the plaintiff's harm, the smaller the group of persons at risk would have to be to qualify as 'substantial'.[443]

[439] Geistfeld *Principles of Product Liability* (2011) 154.
[440] Ibid.
[441] Eg. *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899 (W. Va. 2007); *Perez v. Wyeth Laboratories, Inc.*, 734 A.2d 1245 (N.J. 1999).
[442] Comment (k).
[443] Ibid.

Warnings of the risks posed by a product will generally not be sufficient where the plaintiff can prove that a safer alternative design could reasonably have been adopted by the manufacturer.[444] Even in cases where risks are so obvious or generally known that warnings would be of little or no use, the manufacturer will nevertheless have a duty to adopt a safer alternative design if this is technically and economically feasible.

The *Restatement (Third)* provides that, in warning and design defect cases, liability should only be imposed where the plaintiff can prove the manufacturer was aware or should have been aware of the risks attendant to product use,[445] in other words, whether the risks were reasonably foreseeable. This evidential burden is particularly heavy in cases involving complex products such as prescription drugs, medical devices and toxic chemicals, where certain risks or side-effects sometimes only become apparent after sale, making warnings prior to sale impossible. The risks that a manufacturer could and should have foreseen are those risks that would have come to light if reasonable testing was conducted prior to placing the product on the market.

Interestingly, non-manufacturing sellers such as wholesalers or retailers, are held strictly liable for design or inadequate warning defects, even though they did not and could not have foreseen the risks posed by the product.[446] *Comment (o)* explains that, as long as the plaintiff can prove that a predecessor in the supply chain could reasonably have prevented the harm by adopting a reasonable safer design or providing better instructions or warnings, it is irrelevant whether the non-manufacturing seller exercised all reasonable care.

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[444] Comment (i).
[445] Comment (m). See also: *Jones v NordicTrac, Inc* 550 S.E.2d 101, 103 (Ga. 2001); Geistfeld *Principles of Product Liability* (2011) 124.
[446] Section 1, comment (e).

Since liability for harm caused by warning and design defects in terms of section 2(b) and (c) only attaches where the risks were foreseeable, the Reporters state that foreseeable product misuse, alteration or modification of the product by the consumer or user are factors that courts should also take into account when judging design or warning defectiveness.[447] For example, there may be situations where the consumer or user misuses the product so unreasonably or abnormally that it simply could not have been avoided by adopting an alternative design or providing a warning against it. Not only can these factors result in a finding that the product is not defective in terms of (b) or (c), it may play an important role in causation[448] and the rules on plaintiff's contributory negligence or responsibility.[449]

Many courts in warning defect cases consider the patent nature of a product risk as grounds for releasing the manufacturer from the duty to warn. This practice is reflected in section 2, comment (j) in the *Restatement (Third),* which explains that inclusion of warnings about risks that are knowable through common sense, would seldom result in a higher level of product safety and could even cause consumers to disregard such warnings, the danger being that they potentially contain information on latent risks as well.

3.2.1.6 (iii) Design Defects

The Reporters of the *Restatement (Third*) note that the bulk of product liability litigation in America revolves around harm caused by alleged defects in product design.[450] Whereas manufacturing defects are premised on a deviation from the manufacturer's design, a product unit with a design defect does conform to the manufacturer's design specifications

[447] Comment (p).
[448] Sections 17 and 18.
[449] Section 17.
[450] Comment (f). See also: Geistfeld *Principles of Product Liability* (2011) 91.

for that product line.[451] The basis for defectiveness here is the unreasonableness of the design itself. According to section 2(b) a product:

> *"is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe."*

The standard of reasonableness is strongly embedded in this definition, making it clear that liability for harm caused by a defect in design is not strict. *Comment (f)* describes section 2(b) as being based on the common-sense notion that liability should not be imposed for design defects unless the harm was reasonably preventable. Hence the use of negligence-based notions such as "foreseeable risks of harm" and a product condition described as "not reasonably safe." In the words of the Reporters,[452] the test for design defect in terms of s 2(b) asks whether:

> *"a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe."*

The concept of "not reasonably safe" replaces the previous formulation of the defectiveness standard under section 402A, which defined a defective product as "unreasonably dangerous." This change was initially proposed by Wade,[453] who contended that the term "unreasonably dangerous" may be misinterpreted by courts to mean that the product must be shown to have been 'unusually or extremely dangerous'.

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[451] Ibid.
[452] Comment (d).
[453] Wade 'On the Nature of Strict Tort Liability for Products' (1973) *Miss L.J*. 44 at 825, 833.

Whether a product is “unreasonably safe” for purposes of design defectiveness, is generally decided by the jury, after the plaintiff has satisfied the court of the existence of a reasonable alternative design ('RAD'). Typically, the jury will be asked: 'Was the product, as designed, manufactured or sold, defective in that it was not reasonably safe for its intended or reasonably foreseeable uses?'[454] The 'reasonably safe' standard contained in section 2(b) can be seen as a minimum standard a product design should meet.[455] Even where the plaintiff can prove that the product design could have been made safer with minimal additional cost, it does not necessarily mean that the defendant's design falls short of what is considered to be 'reasonably safe'.[456]

The requirement of a RAD goes to the heart of design defectiveness in terms of section 2(b). The enquiry into whether a proposed alternative design is reasonable necessarily involves a balancing of the risks and benefits of the actual product design with those of the design alternative. Although not the exclusive test, courts in the majority of design defect cases perform a type of risk-utility analysis by requiring, either explicitly or implicitly, proof of the existence of an alternative, safer design which the manufacturer could have practically adopted at the time of manufacturing or sale.

Those jurisdictions that explicitly require proof of a RAD, make it clear that evidence of a reasonable, safer and practical alternative design, which was available to the manufacturer, is an indispensable component of a *prima facie* case of design defect. Furthermore, in most of these cases, consumer expectations are explicitly rejected as an independent test for defectiveness. For instance, in a case involving an alleged design

[454] *Jurado v Western Gear Works* 619 A.2d 1312, 1315 (N.J. 1993).
[455] Stapleton 'Product Liability, an Anglo-American Perspective' (2000) *Washburn Law Journal* 39 at 396.
[456] Ibid.

defect in an automobile the Alabama High Court stated that, to establish defectiveness, the plaintiff must prove the existence of a RAD by showing:

> *"(a) the plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design, and that,*
>
> *(b) taking into consideration such factors as the intended use of the vehicle, its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used."* [457]

The broad range of factors contemplated by the court demonstrates the inherent risk-utility nature of the RAD requirement. Regardless of whether a jurisdiction explicitly adopts a risk-utility test or not, by requiring proof of an alternative design that is reasonable, a court is bound, in any event, to weigh a range of factors which are relevant to that specific case, and which inevitably boil down to a balancing act traditionally performed in a negligence-based reasonableness test.

Several states recognise the possibility that evidence of a RAD may not be required in some cases. For example, Maryland courts have recognised the possibility that defectiveness may be established without performing risk-utility balancing in exceptional cases where a product carries an "inherently unreasonable risk." [458] An 'inherently unreasonable risk' is considered by courts in this jurisdiction to be akin to a manufacturing defect in the sense that, in both instances, the product fails to function as the manufacturer

[457] *General Motors Corp v Edwards* 482 So.2d 1176 (Ala. 1985).

[458] *Phipps v General Motors Corp* 363 A.2d 955 (Md.1976) where the court cites examples of unreasonably dangerous products or product designs such as: the steering mechanism of a new automobile causing a car to swerve off the road, the brakes of a new automobile suddenly failing, or the drive shaft of a new automobile separating from the vehicle when driven in a normal manner.

intended.[459] The Reporters consider this to be consistent with section 3 of the *Restatement (Third),* which allows for an inference of defectiveness to be drawn on certain facts, such as where the product failed to perform its manifestly intended function.

The more common cases in which courts abandon the RAD requirement involve product designs that are "manifestly unreasonable." In these cases, the product design poses a level of risk so high that it should be removed from the market rather than redesigned. Hence, the existence or possibility of a RAD is irrelevant.[460] This position is consistent with section 2 comment (e) of the *Restatement (Third)*, relating to "manifestly unreasonable" products.

Some jurisdictions apply a risk-utility test, thereby implicitly requiring proof of a RAD. Courts performing a risk-utility analysis in design defect cases weigh, *inter alia*, the likelihood and magnitude of foreseeable harm against the duty of the defendant to prevent such foreseeable harm.[461] According to the Reporters, this duty to prevent harm can take only one of two forms in the context of design defectiveness: Either the defendant had the duty to adopt a safer RAD[462] or the product should never have been made commercially available, reflecting the rare cases of 'manifestly unreasonable' products under comment (e) to section 2. It follows, that in the majority of design defect cases, where comment (e) is not applicable, the court will apply a risk-utility analysis which inevitably poses the question of whether the manufacturer could have and should have adopted a RAD.[463]

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[459] *Ziegler v Kawasaki Heavy Indus*. 539 A.2d 701,705 (Md.Ct.Spec.App.1988).
[460] See for instance, the Oregon Supreme Court decision in *Wilson v Piper Aircraft Corp*. 577 P.2d 1328 n.5.
[461] Reporter's Note to Restatement (Third) Part II B, p.65.
[462] Section 2(b).
[463] See for instance, the approach by Florida courts: *Radiation Technology Inc.v Ware Construction Co*. 445 So.2d 329 (Fla.1983), as cited in the subsequent decision of *Light v Weldarc Co. Inc*. 569 S0.2d 1302,1304 (Fla.Dist.Ct.App.1990). Florida courts apply a risk-utility analysis which does not explicitly take into account a RAD as phrased by section 2(b), but rather balances: *"the likelihood and gravity of potential injury against the utility of the product, the availability of other, safer products to meet the same need, the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of*

Some jurisdictions apply a consumer expectations test based on risk-utility, thereby implicitly requiring proof of a RAD. Although it may be considered somewhat confusing usage of two defectiveness standards, courts in some jurisdictions seemingly apply a consumer expectations standard, yet resort to balancing of risk and utility factors to establish whether the product meets the 'reasonable expectations' of the consumer.[464] Whether a consumer expectations test based on a risk-utility analysis incorporates the RAD factor will arguably depend on the specific facts of a case.

A distinct minority of states apply a consumer expectations test without requiring proof of RAD in design defect cases. In terms of this test, design defectiveness is premised solely on the failure of a product to meet the expectations of the ordinary consumer. Case law illustrates how courts have limited the scope of application of this standard to simple, non-complex products. For instance, California law up until 1994 adopted consumer expectations as an independent standard for design defectiveness. This position was reconsidered in *Soule v General Motors Corp*[465] where the Supreme Court, while conceding that consumer expectations may play a limited role in determining design defectiveness, found it to be entirely inadequate for complex design cases as consumers have no idea how a complex product should perform or what level of safety it should have in relation to all foreseeable hazards. The court noted that consumer expectations would be relevant in determining defectiveness in cases where the everyday experience of the product's users allows a conclusion that the product's design violated minimum safety assumptions and is thus defective regardless of expert evidence as to its merits. The

instructions and warnings on safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive."

[464] See, for instance: *Potter v Chicago Pneumatic Tool Co* 694 A.2d 1319 (Conn.1997).

[465] 882 P.2d 298 (Cal.1994).

Reporters note such cases are similar to those typically covered by section 3, allowing for an inference of defectiveness to be drawn where the facts speak for itself.

An exception to the evidential burden of the section 2(b) criteria for design defectiveness is a case brought under section 3 involving circumstantial evidence aimed at creating an inference of design defect. Analogously to the *res ipsa loquitur* doctrine under the law of negligence, a design defect would be inferred where the very nature of the injury-causing incident supports the conclusion that the product failed to fulfil the function that the manufacturer manifestly intended it to.[466] Some courts have chosen not to demand proof of a RAD here, and apply the seemingly opposing standard of consumer expectations to determine defectiveness.[467] Due to their low or negligible social utility and great risk of danger, so the reasoning goes, liability should be imposed for these categorically defective products regardless of whether the plaintiff can prove a RAD or not.[468] A further exception is section 4, which provides that a product design will be defective *per se* if it can be shown to violate a safety statute or regulation, regardless of the existence of any safer, alternative designs.

Further, where a design is simply manifestly unreasonable,[469] the court may find the design defective without applying the general defectiveness criteria under section 2(b). Comment (e) to section 2(b) recognises the possibility, as numerous courts have suggested, that there may be instances where a product design is 'so manifestly unreasonable', in the sense that it has such low social utility and such a high degree of danger that the design should be held defective regardless of the fact that no proof of a

[466] Henderson & Twerski 'Achieving Consensus on Defective Product Design' (1998) *Cornell L. Rev*. 83 at 874.
[467] Comment (b).
[468] Comment (e).
[469] Section 2, comment (e).

RAD can be produced. According to the Reporters, instances of manifestly unreasonable designs are very exceptional, since it would have to be shown that 'the feature of design that presents the risk of harm to be the very same feature upon which some persons, albeit unreasonably, place value.'[470] The logic underlying this qualification is that, since the design feature that gives the product its value determines which alternatives could have been considered, a design feature that is so unreasonably and manifestly unsafe yet gives the product its value, has no safer alternative, or RAD.[471]

Where none of the abovementioned exceptions apply, courts are faced with what the Reporters refer to as 'classic design cases', which require all the criteria of section 2(b) to be met in order to establish defectiveness. The reporters describe 'classic design cases' as those where 'either no specific safety standards apply, or the designs comply with the applicable standards, but the plaintiffs nevertheless plausibly claim that the designs are unacceptably dangerous, and therefore, legally defective.'[472] It is in these cases that the court is required to apply a more nuanced, general, normative standard for defectiveness which ultimately requires a determination of the level of design safety that is acceptable for the product in question.

Evaluating defectiveness in terms of section 2(b) involves two key questions: Firstly, whether the alternative design proposed by the plaintiff is reasonable, and if so, whether the defendant's failure to adopt that alternative design rendered the product unreasonably safe. The Reporters provide in *comments (f)* and (*g)* a range of reasonableness factors

[470] Henderson & Twerski 'What Europe, Japan and Other Countries Can Learn' (1999) 34, 1 *Texas International Law Journal* at 8.
[471] 72 A.L.I. Proc.201,202n (1995) (remarks of R. L. Habush, Attorney) as discussed by Stapleton in 'Restatement (Third): An Anglo-American Perspective' (2000) 39 *Washburn Law Journal* at 391.
[472] Henderson & Twerski 'Achieving Consensus on Defective Product Design' (1998) *Cornell L. Rev*. 83 at 876.

essentially amounting to a broad risk-utility balancing that may be considered under section 2(b).

The *rationale* for introducing the RAD requirement, according to the Reporters, was to avoid a risk-utility analysis that is too polycentric for courts to manage.[473] They contend that, in the absence of an alternative design which the court can compare to the actual design, the court would have to assess the overall costs and benefits of the defendant's design, which amounts to what is termed 'macro risk-utility balancing'.[474] Instead of simply comparing the marginal differences between the defendant's design and the proposed alternative, the court would be faced with the 'unmanageable' question of whether, in light of all the costs and benefits, the defendant's design was 'good for America'.[475]

The RAD required by section 2(b) does not necessarily have to be a design that is in actual use within the relevant industry. The plaintiff would meet this criterion by presenting sufficient evidence, often by means of expert evidence, of a theoretical alternative design that is both technologically feasible and practical. Further, although it would be preferable, plaintiffs are generally not expected to provide technical design drawings or to develop a prototype, merely testimony which 'supports the conclusion that a RAD could have been practically adopted at the time of sale.'[476] For instance, to qualify as a practical alternative, Indiana law[477] requires such a design to be 'cost-effective under general negligence principles'.

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[473] Henderson & Twerski 'Arriving at Reasonable Alternative Design: The Reporters' Travelogue' (1997) *U.Mich.J.L.Reform* 30 at 584-86. See also: Henderson & Twerski 'Achieving Consensus on Defective Product Design' (1998) *Cornell L. Rev*. 83 at 884-87.

[474] Henderson & Twerski 'Arriving at Reasonable Alternative Design: The Reporters' Travelogue' (1997) *U.Mich.J.L.Reform* 30 at 588.

[475] Henderson & Twerski 'What Europe, Japan and Other Countries can Learn' (1999) *Tex. L.J.* 34 at 20.

[476] Comment (f), citing, for example: *Surace v Caterpillar Inc* 111 F.3d 1039 (3d Cir.1997).

[477] Ind.Code Ann. sectionsection 33-1-1.5-2.5 (West 1994), as applied in *Whitted v General Motors Corp*. 58 F.3d 1200, 1206 (7th Cir.1995).

When evaluating the reasonableness of the proposed alternative design, courts are required to judge its safety as a whole. Comment (g) states that, even if the adoption of the alternative design would have prevented or lessened the harm caused to the plaintiff, such alternative would be deemed unreasonable if, at the same time, it presented other equal or even greater risks to consumers.

Proof of the existence of a RAD does not automatically imply that the defendant's design was 'not reasonably safe.' Whereas the first part of the defectiveness enquiry under section 2(b) asks whether the defendant could have adopted a reasonable alternative design, the second part essentially asks whether the defendant should have adopted the proven design alternative in order to avoid supplying a product that is 'not reasonably safe'. This part of the enquiry involves a 'normative balancing process', in which the jury has no choice but to weigh up all the relevant costs and benefits relating to the product design in order to determine whether the defendant's design was, based on aggregate risk-utility, 'good for America'.[478]

Stapleton[479] points out that this broad normative standard applied in the second part of the design defectiveness test, represents exactly the type of 'unmanageability' which the Reporters were hoping to avoid by introducing the RAD requirement. Whether the defendant could have adopted a RAD only takes the case through an 'additional filtering gateway', before the question of design defectiveness ultimately rests again on the vague and open-ended normative standard of whether the defendant's design was safe enough, or phrased differently, whether a safer design should have been adopted.[480]

[478] Stapleton 'Restatement (Third) of Torts: Products Liability, an Anglo-American Perspective' (2000) *Washburn Law Journal* 39 at 396.
[479] Ibid.
[480] 398.

Section 2(b) restates the consensus position regarding the standard for design defectiveness in so-called 'classic design cases', as it has emerged from case law in the various states. It is clear from the formulation of this section that the majority of courts agree that design defectiveness should be based on some form of reasonableness standard, which involves a balancing act closely resembling the traditional negligence enquiry.[481]

One of the most frequently cited risk-utility tests in design defect cases is the so-called 'Wade test', developed by John Wade in the early 1970's. This seven-factor test provided guidance to courts across the United States in determining whether a product is 'unreasonably dangerous' for purposes of strict liability under the former section 402A. He listed the following factors as relevant to risk-utility balancing in the context of product liability:

(1) The utility and desirability of the product: its utility to the user and the general public.

(2) The safety of the product: the likelihood that it will cause injury, and the probable gravity of the injury.

(3) The availability of an alternative product with the same utility but not as unsafe.

(4) The manufacturer's ability to eliminate the unsafe characteristic of the product without impairing its utility or making it too expensive to maintain utility.

(5) The user's capacity to avoid the danger by exercising care when using the product.

(6) The user's expected awareness of the risks inherent in the product and their avoidability, due to common knowledge of the obvious condition of the product, or suitable warnings or instructions.

[481] Section 1 comment (a).

(7) The ability of the manufacturer to spread the loss by setting the price of the product or carrying liability insurance.[482]

In support of the Wade-model of risk-utility, some argue that it avoids the rigidity of the consumer expectations test.[483] To illustrate: A highly useful product which contains a low and unavoidable risk which consumers were not aware of, could disappoint consumer expectations sufficiently to result in liability. In contrast, a risk-utility test would grant the defendant the opportunity to justify his product on the grounds of its high utility, which overshadows its comparatively low risk. Conversely, where a product poses a patent risk, consumers' expectations may be so low that the product cannot be said to disappoint them, even though the risk could easily have been avoided by an alternative design for example. Liability, in this case, would not attach based on a consumer expectations test, whereas a risk-utility analysis would bar any 'patent danger' defence that a manufacturer might attempt to rely on.[484]

The RAD required by section 2(b) in determining design defectiveness should not be confused with the 'available substitute' listed as the third factor in the Wade-test. As the drafters of the *Restatement (Third)* point out, this 'available substitute' refers to the 'technological feasibility of an alternative design' which is merely one of the factors in the risk-utility analysis for design defectiveness.[485] In contrast, the 'reasonable alternative design' required by section 2(b) represents something broader: Firstly, it requires that the proposed alternative design be 'reasonable', which already involves the balancing of a range of risk-utility factors. Secondly, linked to the RAD requirement, is the normative

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[482] Wade '*On the Nature of Strict Tort Liability for Products'* (1973) 44 *Miss. L.J.* at 837-38.
[483] Myers 'Dean John Wade and the Law of Torts' (1995) 65 *Mississippi Law Journal* at 29.
[484] Shapo '*In Search of the Law of Products Liability: The ALI Restatement Project*' (1995) 48 *Vand. L. Rev*. at 662-63 & n.158.
[485] Henderson & Twerski 'Achieving Consensus on Defective Product Design' (1998) 83 *Cornell Law Review* at 889.

question of whether that design alternative should have been adopted by the manufacturer to render his product 'reasonably safe'. The RAD required under section 2(b), which essentially asks whether a reasonable manufacturer would have adopted that alternative, safer design, can thus be said to represent the broad risk-utility balancing process itself, and should not be understood as equivalent to merely one of the seven factors in Wade's risk-utility analysis.[486] Owen argues that the section 2(b) test can be formulaically be expressed in one of two ways:[487]

D = RAD + NRS
or
D = RAD = NRS

in which D means 'defective'; RAD means 'reasonable alternative design', and NRS means 'not reasonably safe'.

The Reporters of the *Restatement (Third),* while endorsing the Wade-model as a useful risk-utility test in determining product defectiveness, provide in section 2 *comment (f)* and (*g)* a list of factors which courts may take into account when determining design defectiveness under section 2(b). Whether a proposed alternative design is 'reasonable', and whether the failure of the manufacturer to adopt that alternative renders the actual product design 'not reasonably safe' involve a balancing of some or all of the following factors, or other factors as the case may require:

"▪ the magnitude and probability of the foreseeable risks of harm;

▪ the instructions and warnings accompanying the product;

[486] Ibid. The reporters refer to *Flaminio v Honda Motor Co*. 733 F.2d 463, 468 (7th Cir.1984), in which the court distinguishes the technical feasibility of an alternative design as a factor in the risk-utility analysis, from the risk-utility analysis itself, in which the court asks whether, in light of all the costs and benefits, the manufacturer should have adopted the alternative design. (In this case, the 'feasibility' of a safety feature was distinguished from the 'net advantages' that would be gained by adopting that feature).

[487] Owen 'Defectiveness Restated: Exploding the 'Strict' Products Liability Myth' (1996) *U.Ill.L.Rev.* 769.

- the nature and strength of consumer expectations (including expectations arising from the product's marketing and portrayal);
- the relative advantages and disadvantages of the product and design alternative;
- the likely impact of the alternative design on production costs;
- the likely impact of the alternative design on product longevity, maintenance, repair and aesthetics; and
- the range of consumer choice among products."[488]

Like the traditional balancing test done under negligence law, the relevance and weight carried by each of these factors will be determined by the facts of the particular case. Typically, the relevant considerations interact with one another. For example, the plaintiff may lead evidence of the magnitude and probability of foreseeable harm, which may be offset by evidence presented by the defendant of the likely reduction in efficiency and utility of the product if the proposed alternative design were to be adopted.[489]

While the obviousness of risk may play a role in the defectiveness enquiry, it cannot serve as an absolute bar to liability.[490] This position is confirmed by the *Restatement (Third)* in the context of design defects, where the Reporters note:

> *"The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented harm to the plaintiff."*[491]

[488] Section 2 comments (f) and (g).
[489] Comment (f).
[490] *Micallef v Miehle Co*. 348 N.E.2d 571 (N.Y. 1976). Owen 'Defectiveness Restated: Exploding the 'Strict' Products Liability Myth' (1996) *U.Ill.L.Rev* at 779.
[491] Section 2, comment (d).

As noted above in 3.2.1.6(ii), liability under the Restatement (Third) for design and warning defects should only be imposed where the plaintiff can establish that the risks were reasonably foreseeable to the manufacturer. Further, any foreseeable product misuse, alteration or modification of the product by the consumer or user are relevant considerations for courts in assessing design and warning defectiveness.[492]

The expectations of a consumer regarding the product design are listed by the Reporters as one of many factors that form part of the broad reasonableness test for design defect.[493] However, it is rejected by the *Restatement (Third)*[494] as an independent measure of design defectiveness, for the main reason that it is incapable, on its own, of taking into account reasonableness factors such as "*whether an alternative design could be implemented at a reasonable cost, or whether it would provide greater overall safety*." Prosser & Keeton also disapprove of consumer expectations as an independent test on the grounds of its ambiguity and vagueness, stating that it provides little guidance to courts in determining design defectiveness:

> *"What does the reasonable purchaser contemplate? In one sense he does not 'expect' to be adversely affected by a risk or hazard unknown to him. In another sense, he does contemplate the 'possibility' of unknown 'side effects.' In a sense, the ordinary purchaser cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised. The test can be utilised to explain almost any result that a court or jury chooses to reach."*[495]

[492] 3.2.1.6(ii).
[493] Comments (f) & (g).
[494] Comment (g).
[495] *The Law of Torts* (1984) 699.

It is worth noting that the consumer expectations test embodied by the former section 402A was followed closely by very few courts.[496] It gradually became clear that this was an impracticable standard for design defectiveness for various reasons, summarised by Davis[497] as follows: Firstly, where a product poses a patent risk of danger, it stands to reason that the consumer incorporated this risk into his expectations, which would prevent liability and consequently reduce incentives for increased product safety.[498] Simply because a risk is open and obvious does not necessarily mean that the consumer was not reasonably entitled to expect more of its safety standard. Secondly, while tort and warranty based theories of product liability have both evolved beyond the limits of privity and now offer protection to bystanders, it is difficult to imagine what expectations, if any, these bystanders may have had of the product which caused their harm. Finally, possibly the most important general criticism of the consumer expectations test relates to its vagueness. Courts found it extremely difficult to determine what exactly an average consumer would expect from the technical characteristics of a product design.

Consumer expectations as a separate standard for defectiveness, is said to fail on normative grounds.[499] The test carries with it the possibility that consumers may form unreasonable expectations of product safety or performance. What independent standard would courts apply to assess the reasonableness of these expectations? If the answer to this difficulty is that consumers are entitled to a reasonable level of design safety, the consumer expectations test is simply falling back on a risk-utility standard that determines what is 'reasonably safe'.[500] The product expectations of the ordinary consumer are said to

[496] Davis 'Design Defect Liability: In Search of a Standard of Responsibility' (1993) 39 *Wayne Law Review* at 1236-37.
[497] 1217,1236-37.
[498] Ibid.
[499] Henderson & Twerski 'Achieving Consensus on Defective Product Design' (1998) *Cornell Law Review* May at 880.
[500] 881.

lack the objectivity needed to constitute a fairness-based standard of liability as they carry with them:

> *"…inescapable psychological connotations that frustrate attempts to objectify the appropriate standard. Is the ordinary consumer to be characterised as risk-averse or risk-preferring? Is the ordinary consumer willing to sacrifice aesthetics, economy, or ease of repair for greater safety? It is unrealistic to believe that one can surgically separate ordinary consumer expectations from the value preferences of flesh-and-blood human beings. Risk-utility analysis confronts this same problem of objectifying the normative standard. However, compared with the consumer expectations standard, risk-utility analysis more successfully addresses this problem."*[501]

The main reason why some courts retain consumer expectations as a test is that it assists plaintiffs considerably in establishing an inference of defect by relying on circumstantial evidence,[502] as provided for by section 3 of the Restatement (Third). Under this test, a plaintiff would succeed in creating an inference by merely showing the product failed to perform the way an ordinary consumer or user would have expected it to under the circumstances, regardless of whether the defendant could have foreseen the risk of harm. Keeton[503] disputes this position, arguing that the defendant should be allowed to rebut such an inference by way of a risk-utility analysis. This would arguably bring the position into line with the general reasonableness standard for design defectiveness under section 2(b), based on the fairness notion that a defendant should not be held strictly liable under section 3 for an unforeseeable and undiscoverable design defect.

The drafters of the Restatement (Third) make it clear that application of a consumer expectations test is limited to those special cases where the product's malfunction in itself

[501] 881-882.
[502] 'Products Liability Design Hazards and the Meaning of Defect' (1979) 10 *Cumb.L.Rev*. 293, 310.
[503] Ibid.

points to defectiveness. They point out that some courts may adopt a pure risk-utility standard and reject consumer expectations as the controlling standard for design defectiveness, yet at the same time refer to the disappointment of consumer expectations in cases where that product design malfunctions. This does not, however, mean that the court is elevating consumer expectations to a general standard for design defectiveness.[504]

Nevertheless, the potential weight of consumer expectations in the general defectiveness enquiry under section 2(b) must not be underestimated. The Reporters explain that the expectations consumers form of how a product should function and the dangers involved in its usage, are interconnected with the magnitude and probability of foreseeable risks of harm, both factors relevant under section 2(b).[505] It is therefore not impossible that consumer expectations may at times, either directly or indirectly, be a weighty or even determinative factor in the risk-utility based test for design defectiveness.

3.2.1.7 Defences / Restriction of Liability

3.2.1.7(i) Compliance with public regulation

Section 4 of the Restatement (Third) deals with the issue of non-compliance and compliance with product safety statutes and regulations. It provides as follows:

> *"In connection with liability for defective design or inadequate instructions or warnings:*
>
> *(a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and*

[504] Henderson & Twerski 'Achieving Consensus on Defective Product Design' (1998) *Cornell Law Review* at 867.
[505] Comment (g).

> *(b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect."*

According to section 4(b) comment (e), regulatory compliance of a product does not provide a defence *per se* to a strict product liability claim. The reason for this is that most product safety regulations are intended only as minimum standards. [506] Geistfeld notes that in most cases, regulatory compliance has not provided defendants with a complete defence as regulations are often not comprehensive.[507] He explains that regulators are often unable to comprehensively examine and regulate every aspect of every product type within their jurisdictions, in which case tort law would complement the regulatory system. On the other hand, where regulators have thoroughly evaluated and regulated a certain area of product safety, based on a comprehensive risk-utility analysis, those regulations may fully define the safety standards imposed by tort law on sellers of products, in which case regulatory compliance may be a complete defence.[508]

3.2.1.7(ii) Absence of defect at time of supply

The Restatement (Third) does not contain an express defence to the effect that it is a defence to show the alleged product defect did not exist at the time it was supplied by the manufacturer.

Nevertheless, such a defence could arguably be raised by a manufacturer by producing evidence that the product was not defective at the time of supply, for instance by showing

[506] Comment (e).
[507] *Products Liability Law* (2011) 193
[508] Ibid.

test results conducted immediately prior to supply. Further, a manufacturer may seek to argue that the factual causation element of 'individualised causation', namely that a defect was present in a product commercially distributed by the defendant, is not made out.[509] Alternatively, a manufacturer may be able to argue that the product was not defective, rather it failed or caused harm as it was altered, modified or tampered with after it was supplied by the manufacturer.[510]

3.2.1.7(iii) Defect not reasonably discoverable

The manufacturer would often attempt to defend its product design by arguing that it conforms to industry practice and incorporates the most advanced or cutting edge technology or scientific knowledge available.[511] Comment (d) regarding design defects states that evidence of industry practice can be relevant to defectiveness in two ways: Firstly, the defendant may present such evidence to show that an alternative design proposed by the plaintiff was not practicable. Secondly, it may be relevant in considering whether the defendant's failure to adopt the alternative design rendered the product 'not reasonably safe'.[512] While relevant, the Reporters point out that such evidence, on its own, is not determinative of defectiveness.[513]

However, this defence, commonly known as the 'state of the art' defence, could be fatal to a plaintiff's claim where a defendant can show that his design maintains the highest degree of safety possible for those products within the market.[514] In such a case, although not theoretically impossible, a plaintiff would rarely be able to prove that the adoption of a

[509] See above at 3.2.1.4.
[510] Restatement (Third) Section 2, comment (p).
[511] Comment (d).
[512] Ibid.
[513] Ibid.
[514] The Reporters note in comment (d) that courts interpret 'state of the art' in various ways: To some, it denotes the prevailing industry custom or practice; to others, it means the safest available technology that has been adopted for use. It has also been interpreted to mean cutting edge technology.

RAD was practical under the circumstances, thereby implying that the prevailing industry practice as a whole could have been improved upon.[515]

In general, US courts agree that conformance with the state of the art is not an absolute defence.[516] In some states, proof of compliance with industry practice is considered to be a relevant factor in determining defectiveness,[517] and may create a rebuttable presumption of non-defectiveness.[518] For instance, particularly in the context of design defects a Colorado court[519] acknowledged that:

> *"state of the art would be an applicable factor in a design defect case, if the alternative design suggested by the plaintiff was not practically feasible in light of the state of the art at the time the product was manufactured."*

A small number of states allow for an absolute defence based on compliance with industry practice, judging the product design against the state of the art existing either at the time of design[520] or at the time the product was made available on the market.[521] In contrast, another minority of states consider evidence regarding the state of the art to be entirely irrelevant to determining defectiveness.[522] The Restatement (Third) clearly rejects these two extreme positions by supporting an approach where evidence of the state of the art can play a role, albeit a limited one, in determining defectiveness.

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[515] Comment (d).
[516] Reporters' Note IV-B page 44.
[517] *Sturm, Ruger & Co v Day* 703 P.2d 396,405 (Alaska 1985); *Elliott v Brunswick Corp.* 903 F.2d 1505 (11th Cir. 1990);
[518] Eg. Colorado Rev. Stat. section13-21-403(1)(a)(1987); Kentucky Rev.Stat. section 411.310(2) (Banks-Baldwin 1978).
[519] *Fibreboard v Fenton* 845 P.2d 1168, 1174 (Colo.1993)
[520] E.g. Indiana Code section33-1-1.5-4(b)(4) (1988); Iowa Code Ann.section 668.12 (West 1987)
[521] Mo. Ann. Stat. section 537.764 (West 1987); N.J. Stat.Ann. section 2A: 58C-3(1) (West 1987).
[522] Eg. In *re Hawaii Fed. Asbestos Cases* 699 F.Supp. 233, 235-236 (D.Haw.1988) the court rejects the state of the art evidence as a relevant consideration in both design defect and failure to warn cases. See also: *Carrecter v Colson Equip*. Co. 499 A.2d 326 (Pa.Super.Ct.1985); *Lewis v Coffin Hoist Division, Duff-Norton Co. Inc.* 528 A.2d 590 (Pa. 1987).

In support of a development risk defence and to rebut a plaintiff's expert evidence, a manufacturer may submit evidence showing compliance with federal regulations regarding design standards, that the manufacturer had submitted all relevant material to regulatory body before gaining government-approval and that the product complies with industry standards.[523]

3.2.1.7(iv) Apportionment of liability

The Restatement (Third) provides for apportionment of responsibility between or among plaintiff, sellers and distributors of defective products and others. Section 17 provides that:

> *"(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."*

The manner and extent of the reduction and the apportionment among multiple defendants are governed by generally applicable rules apportioning responsibility.[524] The Reporters note that a strong majority of states apply the comparative responsibility doctrine, however the rules or developed principles of apportionment of responsibility vary among the jurisdictions.[525]

Where a plaintiff's conduct amounts to misuse, alteration or modification of a product, this may be relevant to the question of defectiveness, causation or the plaintiff's contributory responsibility.[526]

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[523] Sudzus & Carroll 'Product Liability 2016 - USA' (2016) *International Comparative Legal Guides* at 3.2.
[524] Section 17(b).
[525] Comments (a) and (b).
[526] Section 2, comment (p).

Some states follow a 'modified' comparative fault, whereby the parties' responsibilities are adjusted in accordance with predetermined thresholds of responsibility. For instance, in some states a plaintiff's recovery is fully barred if the plaintiff is found to have contributed more than 50% to the harm.[527] The seriousness of the plaintiff's 'fault' or contributory conduct and the nature of the product defect are relevant considerations in apportioning responsibility between the plaintiff and supplier.[528]

3.2.1.7(v) Prescription

The *Restatement (Third)* contains no provisions regarding limitation periods for bringing a product liability claim. Statutes of limitations in each state govern the time limit for bringing product liability claims, which generally varies between two to six years.[529]

States also impose repose periods by way of statute, which vary from state to state. A repose period denotes the number of years that consumers can use a product during its useful life before bringing a court proceeding, following expiry of which manufacturers are immune from liability.[530]

3.2.1.7(vi) Contractual restriction of liability

The effect of contractual limitations, waivers, disclaimers or other exclusion clauses are dealt with in section 18 of the Restatement (Third), which provides that:

> *"Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid product liability claims against sellers or other distributors of new products for harm to persons."*

[527] Comment (b). See also: Sudzus & Carroll 'Product Liability 2016 - USA' (2016) *International Comparative Legal Guides* at 3.1.
[528] Comment (d).
[529] Comment (b). See also: Sudzus & Carroll 'Product Liability 2016 - USA' (2016) *International Comparative Legal Guides* at 5.
[530] Ibid.

The Restatement does not allow commercial sellers or other distributors of new products to avoid product liability by means of limitation clauses in the contract of sale.[531] There is a presumption that the ordinary consumer lacks adequate information and bargaining power to agree to a fair contractual limitation of rights clause in a contract of sale.[532] This does not prohibit parties within the supply chain from contracting among themselves with respect to indemnity.[533]

3.3 THE EUROPEAN UNION

3.3.1 The Product Liability Directive 85/374/EEC

Prior to 1985, product liability in Europe was governed separately by the respective national laws of EU member states, whether based in contract, tort or special liability. Pressure to harmonise laws within the European Community coupled with widespread demands for increased consumer protection following the *Thalidomide* tragedy led the EEC Council to adopt the *Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products 85/374/EEC (*"the EU Directive"*)*.

The legal status of the EU Directive differs from the advisory US *Restatements* in the sense that it places an obligation on the EU Member States to transpose its provisions as closely as possible into their national legal systems.[534] In terms of article 189 of the *Treaty of Rome,*[535] the EU Directive is *'binding, as to the result to be achieved, upon each*

[531] Comment (a).
[532] Ibid.
[533] Ibid.
[534] Member states were given 3 years from the date of notification (July 30, 1985) to transpose and enforce the Directive within their legal systems.
[535] *Treaty establishing the European Economic Community* (TEEC) signed on 25 March 1957.

member state to which it is addressed, but shall leave to the national authorities the choice of form and method.'

The implementation of the EU Directive in the various states has been done in different ways. Some states, such as France and the Netherlands, have amended their existing civil codes in line with the EU Directive, whereas other states such as Germany and the United Kingdom have introduced a separate statute to regulate this new product liability rule. Some states have made use of the discretion given by the EU Directive regarding certain optional provisions. Importantly, the EU Directive does not impact on pre-existing laws governing product liability in the Member States. Article 13 provides:

> *"This Directive does not affect any right an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified."*

In 2003 a report was prepared for the European Commission regarding the practical operation of the EU Directive on product liability in the Member States.[536] Participants in the study included consumer representatives, producers, suppliers and trade associations, insurers, reinsures, brokers and insurance associations, lawyers, regulators and other government agencies and legal academics. The study found that there had been a noticeable increase in product liability claims in the EU over the past decade.[537] While participants cited the EU Directive as a factor that contributed to the increase in claims, more frequently cited factors included increased consumer awareness and access to information and media activity.[538] Insurers reported that the incidence of out-of-court

[536] Lovells 'Product liability in the European Union - A report for the European Commission' (2003) [Online] Available: file:///C:/Users/cxk/Downloads/product-liability-report-lovells-study-en%20(1).pdf.
[537] 31.
[538] 34.

settlements had increased over the past 10 years, which they attributed mainly to increased media activity and greater access to legal assistance/advice.[539]

In terms of insurance coverage, less than 25% of participants reported that the EU Directive had had an impact on the type of insurance policies offered in the EU.[540] However, more than 50% of insurers said it has impacted the basis on which insurance is offered, for instance, premiums or conditions for coverage, and on the way they deal with insureds.[541]

The EU Directive was viewed by most participants as striking an appropriate balance between the interests of producers/suppliers and consumers.[542] The majority of consumer representatives considered that the EU Directive does not adequately protect the needs of consumers for reasons relating to the development risks defence and burden of proof.[543] On the other hand, a minority of producers/suppliers opined that the EU Directive did not adequately protect them due to the application of the EU Directive's strict liability to design and warning defects.[544] These participants questioned the appropriateness of strict liability for design defects and failure to warn cases, suggesting that a negligence-based standard was better suited to such defects, as is followed by the US Restatement (Third).[545] Some participants, particularly representatives from the pharmaceutical industry, argued that a defence of regulatory compliance ought to be introduced to apply where products' safety is closely regulated and the products complied with those regulations.[546] The argument in

[539] 41.
[540] 29.
[541] Ibid.
[542] 44.
[543] Ibid.
[544] Ibid.
[545] 52.
[546] 51.

support of this is that '*it is not for national civil courts to second guess or undermine regulations that deal comprehensively with the safety of particular products.*'[547]

A 2011 report prepared by the European Commission[548] found that, between 2006 and 2011, the number of claims made on the basis of the EU Directive as well as the number of out-of-court settlements for product liability claims in the Member States continue to increase.[549] The report reiterated that the aim of the EU Directive was to create a general liability framework that afforded consumers adequate protection without stifling innovation.[550] The European Commission concluded that the EU Directive should not be amended as it struck an appropriate balance between manufacturers and consumers.[551]

3.3.1.1 Parties Liable

The EU Directive imposes faultless liability on the "producer" for damage caused by a defect in his product.[552] Pursuant to article 3(1), "producer" is defined to mean the manufacturer of a finished product, the producer of any raw material or a component part and any person who presents himself as the producer of the product by placing his name, trade mark or other distinguishing feature on the product. Further, without prejudice to the liability of the producer, a person who imports into the EU a product for sale, hire, leasing or distribution in the course of his business is deemed to be a producer.[553]

[547] Ibid.
[548] European Commission 'Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999' (2011).
[549] 11.
[550] 9 - 11.
[551] 11.
[552] Article 1.
[553] Article 3(2).

In circumstances where the producer cannot be identified, each supplier of the product is deemed to be its producer, unless the supplier informs the injured person, within a reasonable time, of the identity of the producer or the person who supplied the product to that supplier.[554] The same rule applies in the case of an imported product, if the imported product does not show the identity of the importer, even if the name of the producer is shown.[555]

3.3.1.2 Potential claimants

The preamble to the EU Directive refers in numerous recitals to the "protection of the consumer." However, the provisions of the EU Directive, in particular articles 3, 4, 8, 9, 11, refer to "the injured person". For instance, article 3 provides that the "injured person" is required to prove the damage caused by the defective product and the causal relationship between the defect and the damage.

Accordingly, the remedy afforded by the EU Directive appears to be available to any person harmed by a defective product, whether that person is the purchaser of the product, a bystander or a defendant who suffers loss as a result of harm caused by a defective product to another person.

3.3.1.3 Goods

The EU Directive originally defined 'product' to mean:

> *"all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural products' means the products of the soil, of stock-farming and of*

[554] Article 3(3).
[555] Ibid.

> *fisheries, excluding products which have undergone initial processing. 'Product' includes electricity."*[556]

This definition of 'product' was subsequently amended by Directive 1999/34EC[557] so that primary agricultural products are no longer excluded. Article 1 of Directive 1999/34EC provides that:

> *"Directive 85/374/EEC is hereby amended as follows:*
> *1. Article 2 shall be replaced by the following: "Article 2. For the purpose of this Directive, 'product' means all movables even if incorporated into another movable or into an immovable. 'Product' includes electricity."*

The recitals to Directive 1999/34EC notes that the inclusion of primary agricultural products within the scope of the EU Directive would assist in restoring consumer confidence in the safety of agricultural products. [558] It is argued that, while it clear that farmers are intended to be included within the scope of the EU Directive, farmers do not easily meet the definitions of 'producer' in article 1(2) of the EU Directive.[559] Farmers could perhaps be defined as producers of raw material pursuant to article 3(1) of the EU Directive.[560]

The reference to movables being "incorporated into another movable" would include component products that are later fitted, assembled into or incorporated into another product. The EU Directive is silent on whether second-hand goods are included, however, the words "all movables" is arguably broad enough to include second-hand goods.

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[556] Article 2.
[557] Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.
[558] At par 5.
[559] Winfield & Jolowicz *Winfield & Jolowicz on Tort* (2014) 310 at footnote 124.
[560] Ibid.

3.3.1.4 Causation

Article 4 of the Directive provides that:

> *"The injured person should be required to prove the damage, the defect and the causal relationship between defect and damage."*

The EU Directive does not provide any further guidance as to the test for causation that ought to be applied by member states. This appears to leave it up to member states to apply, for instance, the general principles of causation used in negligence claims. However, it is questioned by some authors whether the general principles of causation applicable in tort law should not be adapted in the case of a strict liability tort to provide for a partial reversal of the burden of proof, given the consumer protection policy underlying the EU Directive.[561]

In the Dutch case of *Leebeek v Vrumona,*[562] a case involving an allegedly defective lemonade bottle, the top of which broke off, provided an interesting application of the *res ipsa loquitur* rule. At the time of the accident in 1988, the Netherlands was already late in implementing the EU Directive by a few months, and was therefore obliged to interpret its tort law in line with the EU Directive. The producer of the bottle denied defectiveness, arguing that it may have broken due to the use of too much force. Although article 4 of the EU Directive places the burden of proving defectiveness on the claimant, the Dutch court found this burden too heavy, and instead opted for a midway: If the claimant could show that he had opened the bottle in a normal way, in other words, absence of any misuse, it will be factually presumed that a defect in the bottle caused the damage. The burden would then shift to the producer to prove the bottle was not defective.

[561] Markesinis & Deakin *Markesinis & Deakin's Tort Law* (2012) 622-623.
[562] HR 24 December 1993, NJ 1994, 214. See discussion in Van Dam *Dutch case law on the EU Product Liability Directive* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 130-31.

The failure of the EU Directive to clarify the standard of proof required to establish causation could mean that plaintiffs in other member states are faced with the same evidentiary difficulties posed by a common law claim in negligence due to the informational and financial imbalances existing between plaintiffs and manufacturers, particularly in the case of products of a complex, technical nature.

3.3.1.5 Harm and damages

Article 9 defines 'damage' for purposes of the EU Directive to mean:

> *"(a) damage caused by death or by personal injuries;*
> *(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:*
> *(i) is of a type ordinarily intended for private use or consumption, and*
> *(ii) was used by the injured person mainly for his own private use or consumption."*

Article 9 provides that the EU Directive is without prejudice to national laws regarding 'non-material damage'. In other words, the member states' respective laws regarding economic loss damages are not affected by the EU Directive.

The Directive prohibits a producer from limiting or excluding its liability in relation to the injured person by a provision to that effect.[563] However, the liability of the producer may be reduced or disallowed where the damage is caused by a defect as well as the fault of the injured person or someone for whom the injured person is responsible.[564]

[563] Article 12.
[564] Article 8(2).

In *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and Others*,[565] which is discussed in further detail below at 3.3.1.6 in the context of the concept of defectiveness, the CJEU was for the first time asked to provide guidance in relation to the scope of damages recoverable under the EU Directive. In particular, the referring German Supreme Court asked the CJEU whether the costs of the removal and replacement of a defective medical device constituted damage caused by a personal injury within the meaning of article 9.

The CJEU adopted a broad interpretation of the meaning of 'damage'. It held that the EU Directive requires a plaintiff to prove a causal relationship between the defect and the damage suffered, the EU Directive allows for damages that are necessary "to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect". Therefore, in the case of the defective pacemaker, the EU Directive covers damages for the cost of replacement of the defective product and the costs of the surgery. The broad interpretation of 'damage' by the CJEU appears to be in conflict with the wording of article 9 of the EU Directive, which expressly provides that 'damage' excludes the cost of replacement of the defective product itself. It is argued that plaintiffs' lawyers in the EU are likely to rely on this ruling by the CJEU to argue that all losses and expenses relating to the use of a defective product, such as the cost of so-called 'medical monitoring' where a medical device has not yet caused injury but may in the future, are recoverable, regardless of how remote that loss may be.[566] Recovery of medical monitoring expenses may also be possible in cases involving a defective pharmaceutical product, where a rare side effect related to it may only manifest many years after use.[567]

[565] Joined cases C-503/13 and C-504/13 (5 March 2015).
[566] Dodds-Smith & Brown 'Recent Developments in European Product Liability' (2016) *International Comparative Legal Guides* at 2.
[567] Ibid.

3.3.1.6 Concept of Defectiveness

Defectiveness under the Directive is based on a consumer expectations standard, which therefore serves as the applicable test for defectiveness within all EU jurisdictions. Several other countries in the Far East, Latin America, the Pacific Rim and most recently, South Africa, have modelled their special product liability provisions of the EU Directive's formulation of this core element.[568] In terms of article 6:

> *"1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:*
>
> *the presentation of the product;*
>
> *the use to which it could reasonably be expected that the product would be put;*
>
> *the time when the product was put into circulation.*
>
> *2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation."*

The EU Directive does not require a product to be absolutely safe. It prescribes a minimum standard of safety to which products should conform, that standard being what a person is entitled to expect in light of all the relevant circumstances. This standard is based on the legitimate expectations of consumers in general, or the public at large, and not upon the subjective expectations formed by the individual consumer. The degree of socially acceptable risk which a product may carry is an issue of fact and will vary from case to case, product to product.[569]

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[568] Reimann 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?' (2003) 51 *American Journal of Comparative Law* at 761.

[569] Hodges 'The European Minefield' (1993) 129 *Product Liability International* at 52-53; Hulsenbeck & Campbell *Product Liability: Prevention, Practice and Process in Europe and the United States* (1989) 24.

The manner in which products are generally marketed to the public, as well as its direct and personal presentation to the final consumer, may impact on consumer expectations regarding product quality and safety.[570] According to Hodges,[571] the presentation factor will have an effect on the product's packaging, in particular, any accompanying warnings, instructions, leaflets or certifications of safety, as well as any promotional or marketing information provided to consumers.

The factor of 'reasonably expected product use' arguably excludes liability for damage caused by unforeseeable product use, or misuse. The Directive does not specify what would qualify as product misuse, since it would depend on the facts of the particular case. Foreseeability of the uses to which a product may be put is closely linked to the foreseeability of harm, both of which are important considerations in a manufacturer's choices regarding design and manufacturing, and especially the extent and substance of warnings or instructions regarding product use accompanying the product. Although at first glance, the foreseeability of harm seems to hint at an enquiry into the negligent conduct of the manufacturer, the drafters of the Directive were careful to avoid any reference to what the producer "could have done differently", or in other words, avoidability of risk or harm. Therefore, unless any of the listed defences apply, a producer may be held strictly liable under the Directive for damage caused by a foreseeable product use, even though there was no way in which the risk of harm could have been avoided.

Courts are required to judge a product's defectiveness in light of industry norms and standards that prevailed at the time the product was made commercially available or put into circulation. This factor links in with article 6(2), which holds that a product will not be

[570] Hodges 'The European Minefield' (1993) 129 *Product Liability International* at 53-54.
[571] Ibid.

considered defective simply because a safer product, either from the same producer or another, was subsequently made available to consumers. When read together, the Directive seems to suggest that similar products available on the market at the time the product was put into circulation, and not at the time of trial, may be considered.

The defectiveness test under article 6, while listing three of the most important considerations that should be taken into account, requires courts to consider "all the circumstances." This gives courts considerable discretion in deciding which other factors are relevant to the enquiry. Whittaker[572] argues that national courts are likely to interpret this Directive in light of its stated goal to impose faultless liability, and thereby limit the factors that may be weighed under article 6 to those that are not in any way relevant to fault. Due to divergences in the definition of 'civil fault' in the various Member States, such an approach to article 6 would result in national courts excluding different factors from the defectiveness enquiry, thereby defeating the harmonisation efforts of the Directive.[573]

A major difference between the EU Directive and its American counterpart, the Restatement (Third), is the fact that the EU Directive draws no express distinction between the three main categories of product defects generally recognised in literature, namely manufacturing defects, design defects and inadequate instructions or warnings. This does not mean that member states may not refer to these categories, however, article 6 imposes on member states one universal test for defectiveness in all types of defect cases. For example, product liability case law in The Netherlands sometimes refers to

[572] *Liability for Products - English Law, French Law and European Harmonization* (2005) 492-494. This approach was followed by in *A v National Blood Authority* (2001) 3 All ER 289.
[573] Ibid.

these categories of defects, however, no legal consequences have flown from the distinction.[574]

Where a national court has doubts as to whether a particular factor should be considered in the test for defectiveness under Article 6(1), it may refer this question to the European Court of Justice (ECJ) for a ruling.[575] In *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and Others*,[576] which is also discussed above at 3.1.1.5 in the context of harm and damages, the German Supreme Court referred a question to the CJEU in relation to the meaning of "defect" under the EU Directive. For the first time since the EU Directive was enacted, the CJEU provided some guidance as to the definition of defectiveness in article 6 of the EU Directive.

The German Supreme Court's question related to two joined cases involving implanted medical devices, namely a pacemaker and a cardioverter defibrillator, both manufactured by Boston Scientific. In particular, the question to the CJEU was whether a product is defective under article 6 if it forms part of a group of products that have a significantly increased risk of failure, but where a defect has not been identified in each specific product within that group. The cases involved recovery claims by the patients' health insurers for the costs of replacing the devices. The difficulty was that affected medical devices were destroyed after surgical removal, which meant there was no evidence to establish that the particular device had in fact malfunctioned.

With respect to the pacemakers, the manufacturer had identified that a certain component in the pacemaker could gradually degrade over time, resulting in a 0.3% to 0.9% risk of

[574] Ibid, citing Dommering-van Rongen *Product-aansprakelijkheid. Een rechsvergelijkend overzicht* (2000) 50.
[575] Article 234 EC Treaty.
[576] Joined Cases C-503/13 and C-504/13.

premature failure due to sudden loss of battery power. The manufacturer made a recommendation to doctors tha they consider replacing the pacemakers and offered to bear the costs of providing replacement devices and the replacement surgery. In relation to the cardioverter defibrillator, it was found that a magnetic switch in the defibrillator could remain stuck in the closed position, preventing the device from treating ventricular and atrial arythmias. The prevalence of this problem was 4 out of 46,000 devices. These patients became aware of an audible beeping tone and the devices were replaced.

In interpreting article 6, the CJEU referred to the sixth recital in the preamble to the EU Directive, stating that this meant that consumer expectations ought to be assessed "in the abstract" with regard to the expectations of the "public at large".[577] The CJEU held that, while the notion of "legitimate expectation" is particularly difficult to define, the expected degree of safety must be determined by taking into account various factors, including the intended purpose of the product, the nature of the product and the requirements of the group of users for whom the product is intended.[578] In other words, while the consumer expectations test is expressed as taking account of the expectations of the public at large, in practice, the test compasses the specific requirements and expectations of the group of users for whom the product is intended.

The CJEU ruled that, where products belonging to the same production series have been shown to have a "*significantly higher than normal risk of failure*", or in which a "*significant number of failures have already occurred*," all products in that production series can be classified as defective for purposes of article 6 without proof that a specific product was defective.[579] The CJEU noted that, on the facts before it, the affected patients were entitled

[577] [29].
[578] [45].
[579] [55].

to expect a particularly high level of safety given that these products are implanted devices which can lead to cardiac failure or death if they failed. The CJEU held that this interpretation of article 6 is consistent with the objectives of the Directive, particularly the second and seventh recitals indicating that the EU Directive was aimed at ensuring a fair apportionment of risks between the injured person and the manufacturer.[580]

It is argued that, while the CJEU took into account the specific risks arising from implanted medical devices on the facts before it, it formulated its ruling broadly so as to apply to any group or series of products that have a potential defect and that it is a relevant consideration where the product has an abnormal risk of harm.[581] It remains to be seen how member states' courts will interpret the CJEU's ruling, particularly, when products would qualify as presenting a "*significantly higher than normal risk of failure*".

It is argued that, while the CJEU has provided some general guidance regarding the defectiveness test under the EU Directive, there are still areas of uncertainty regarding the interpretation of article 6, such as what information may be considered by courts in assessing defectiveness.[582] For instance, it is questioned whether product information and warnings supplied to learned intermediaries ('the learned intermediary doctrine') or information supplied directly to consumers ('direct-to-consumer advertising') would be relevant in the assessment.[583]

[580] [30].
[581] Dodds-Smith & Brown 'Recent Developments in European Product Liability' (2016) *International Comparative Legal Guides* at 2.
[582] Ibid.
[583] See, for instance, the discussion of the learned intermediary doctrine and direct-to-consumer marketing in the context of inadequate instructions or warning defects under the US *Restatement (Third)* above at 3.2.1.6(ii).

In 2011, a report by the European Commission on the application of the EU Directive[584] noted that representatives of the European pharmaceutical industry take the position that the EU Directive fails to properly take into account that fact that this industry is highly and strictly regulated. They argue that the EU Directive should, in considering defectiveness, take into account the fact that the use of pharmaceutical products is generally subject external examination by medical professionals (learned intermediaries) and that pharmaceutical manufacturers do not have any control over the way in which medicines are prescribed or administered.

3.3.1.7 Defences / Restriction of Liability

3.3.1.7(i) Compliance with public regulation

A producer can escape liability under article 7(d) of the EU Directive if it can show that "*the defect is due to compliance of the product with mandatory regulations issued by public authorities.*"[585]

The wording of this section indicates that the defence is limited to circumstnaces where the regulations in question create a legal obligation on the producer to comply. In other words, minimum product standards that are not compulsory but rather industry guidelines, would not bring a manufacturer within the realms of this defence.

In reality, it would be a rare scenario where a product defect is caused by compliance with a mandatory product regulation, which is usually aimed at improving product safety. It is interesting to note that this provision does not state that regulatory compliance must be the

[584] Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999

[585] Article 7(d).

sole cause of the product defect. Arguably, where a product is found to be defective due to compliance with a mandatory regulation in one respect and due to some other unrelated factor, such as the producer's faulty design or a defective component, the producer would not be able to rely on article 7(d) as defence where the plaintiff can show that the defect unrelated to regulatory compliance was also causative of the harm.

It should also be noted here that proof of compliance with mandatory regulations do not automatically provide producers with a defence under the EU Directive. Often, mandatory regulations are set as minimum safety standards and compliance with them do not necessarily discharge producers' duty to ensure their products are safe. Having said that, in circumstnaces where a certain prodcut is heavily regulated and sets high safety standards, evidence of regulatory compliance may be a weighty consideration in the assessment of defectiveness under article 6, or even indicative of the state of scientific knowledge available for purposes of the 'development risk' defence under article 7(e).

In 2011, a report by the European Commission on the application of the EU Directive[586] noted that there is very little case law on the application of article 7(d). Interestingly, according to the report, Hungarian authorities indicated this defence is mainly raised in relation to vehicles and medical products, but that producers' liability is rarely established under the national law transposing the EU Directive.

3.3.1.7(ii) Absence of defect at time of supply

Pursuant to article 7(b), a producer can escape liability under the EU Directive if it can establish that:

[586] Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999

> *"having regard to the circumstances, it is probable that the defect did not exist at the time the product was put into circulation by the producer or that the defect came into being afterwards".*[587]

This defence would cover the scenario where a producer can show evidence such as compliance with stringent quality control procedures, which justifies the conclusion, on balance, that the product was not defective when it left the producer's control. This defence would be relevant where a product became defective due to misuse, modification or alteration of a product by a party other than the producer after the producer put the product into circulation.

It is relevant to note here that, in the case of a component manufacturer, it is a defence if it can be shown that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product."[588] In other words, it may be that the component was not defective at the time of supply to the manufacturer of the product into which the component was incorporated. Rather, the compnent only became defective when it was incorporated into another product, either due to the design of that other product and the specifications given by the manfuacturer of the final product to the component manufacturer.

3.3.1.7(iii) Defect not reasonably discoverable

Perhaps the most controversial of the listed defences in the EU Directive is the so-called 'development risk defence' in article 7(e), pursuant to which a producer can escape liability by showing that:

[587] Article 7(b).
[588] Article 7(f).

> *"the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered;*[589]

It has been held by the CJEU that the reference to "scientific and technical knowledge" in article 7(e) does not refer to the state of knowledge in the industrial sector within which the producer of the product operates, but rather "*the state of scientific and technical knowledge, including the most advanced level of such knowledge*" in general.[590] In other words, it is irrelevant to the question of liability under the EU Directive that no-one within the particular class of manufacturer takes the necessary steps to eliminate or prevent a defect, if such steps can be taken based on the available knowledge. Section 7(e) is directed that the objective state of scientific and technical knowledge available, "of which the producer is presumed to have been informed."[591]

However, the CJEU did qualify this by stating that the relevant knowledge must have been accessible at the time the product was put into circulation.[592] The CJEU conceded that the 'accessibility' of knowledge raises difficulties of interpretation, but held this is a matter for national courts to resolve.[593]

In the UK Advocate General's opinion, the practicability and cost of the steps to eliminate or prevent the defect or the fact that the manufacturer did not keep up to date with scientific knowledge in this area, as disclosed in specialist literature, are irrelevant to section 7(e) of the EU Directive and section 4(1)(e) of the UKCPA.[594] Further, the

[589] Article 7(e).
[590] *European Commission v United Kingdom* [1997] All E.R. (EC) 481 at [20]; [26].
[591] [27].
[592] [29].
[593] Ibid.
[594] Ibid.

Advocate General opines that the relevant knowledge must be available in a language that is reasonably accessible and in a format that has a reasonably high degree of circulation.

Two member states, Finland and Luxembourg, have elected to exclude this defence for all products in their national legislation implementing the Directive. In some states, application of the defence is excluded for specific products.[595]

A study conducted for the European Commission in 2002 on the economic impact of the Directive in EU member states and in particular, the development risk defence, found that the practical application of the defence was still extremely limited in reported judgments.[596]

In 2011, a report by the European Commission on the application of the EU Directive[597] considered, among other things, whether the article 7(e) defence ought to be retained. The report notes that industry and insurance representatives believe removal of the defence would stifle innovation and raise insurance costs. These stakeholders argue the fact that exclusion removal of this defence has not had any significant impact in Finland or Luxembourg is due to the size of the markets in these member states. On the other hand, consumer representatives are in favour of removing this defence. The report notes that stakeholders have differing opinions regarding the effectiveness of this defence, but recognise that the EU Directive overall strikes an appropriate balance between the competing interests of industry and consumers.

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[595] For instance, in Spain the defence does not apply to pharmaceutical products and foodstuffs for human consumption.

[596] Fondazione Rosselli 'Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products ETC 2002/B5' at 130.

[597] Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999

It remains unclear exactly what practical effect the development risk defence has had to date in the EU. However, it appears to be considered important in order to maintain an appropriate balance between producers and persons harmed by defective products and has had a limited economic impact in at least two member states. Of course, this does not mean that the defence is not raised frequently and successfully in out of court negotiations and settlements.

3.3.1.7(iv) Apportionment of liability

In circumstances where the harm is caused by a defect in the product as well as the fault of the injured person or a person for whom the injured person is responsible, article 8 of the EU Directive provides that the producer's liability may be reduced or disallowed, having regard to all the circumstances.[598]

However, the liability of the producer will not be reduced if the harm is caused by a defect in the product and an act or omission of a third party.[599] This provision is subject to the various member states' national law concerning the right of contribution or recourse.

3.3.1.7(v) Prescription

Article 10 of the EU Directive imposes a 3 year limitation period, which commences to run from the day "*the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer*." Article 10 provides that this provision does not affect member states' laws regarding suspension or interruption of limitation periods.

[598] Article 8(2).
[599] Article 8(1).

Further, article 11 of the EU Directive imposes a so-called 'long-stop' provision where all rights conferred on the injured person by the EU Directive are extinguished after a 10 year period from the date the producer put the actual product in question into circulation, unless the injured person has brought proceedings against the producer in the interim.

In *O'Byrne v Sanofi Pasteur MSD Ltd*[600], the CJEU held that this long-stop limitation period should be interpreted as commencing from the point at which the product "leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed."[601]

3.3.1.7(vi) Contractual restriction of liability

Article 12 of the Directive provides that the liability of the producer, in relation to the injured person, may not be limited or excluded by a provision limiting his liability or exempting him from liability. Any contractual provision which has the effect of limiting or excluding the producer's liability would therefore be void and cannot be raised as a defence.

3.3.1.8 Implementation of the Directive by EU Member States

3.3.1.8(i) The United Kingdom

In fulfilment of its obligation to implement the European Directive, the United Kingdom introduced the *Consumer Protection Act* ('UKCPA') in 1987. Part 1 of the UKCPA contains the relevant strict product liability provisions.

In practice, claimants in the UK are more likely to bring a claim under the UKCPA than under negligence.[602] However, common law claims in negligence remain necessary in

[600] Case C-127/04 (9 February 2006).
[601] [27].
[602] *Winfield & Jolowicz on Tort* (2014) 297.

some cases, for instance where harm is caused to property not intended for private use[603] or where a strict liability claim is statute barred by the special limitation periods under the UKCPA.[604]

While the UKCPA is seen as an important development in English tort law, it is argued that liability under the act is not absolute and shows affinities with common law.[605] It remains unclear to what extent the UKCPA has had any effect in practice.[606] The UK has had very low rate of claims arising from the Directive, despite a common perception in Europe that the UK has a more litigious, "American" culture than other EU member states.[607]

Parties liable

The UKCPA imposes liability on three categories of persons in relation to a defective product, namely:

> *"(a) the producer of the product;*
> *(b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;*
> *(c) any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another."*[608]

Section 1(2) of the UKCPA further defines a 'producer' as:

> *"(a) the person who manufactured it;*
> *(b) in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it;*

[603] Section 5(3) UKCPA.
[604] 297. See sections 22A and 22B UKCPA.
[605] 319.
[606] *Winfield & Jolowicz on Tort* (2014) 319.
[607] 320.
[608] Section 2(2).

(c) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agricultural produce), the person who carried out that process."

The first definition of 'producer', when read with the definition of 'product' in section 1(2), includes both manufacturers of component parts and the final manufacturer or assembler of the product.

Mere suppliers of defective products may also be held liable in certain circumstances. Section 2(3) provides that, where a supplier receives a request from the 'person who suffered the damage' to identify the producer, importer or a person who held himself out as the producer, and the supplier fails to comply with the request or identify his own supplier within a reasonable time, that supplier will be liable under act. This request for identification may be made to any supplier of the defective product, not only the supplier who directly supplied the product to the claimant. Section 46 provides a broad definition of the concept 'supply' which includes:

"(a) selling, hiring out or lending the goods;
(b) entering into a hire-purchase agreement to furnish the goods;
(c) the performance of any contract for work and materials to furnish the goods;
(d) providing the goods in exchange for any consideration…other than money;
(e) providing the goods in or in connection with the performance of any statutory function; or
(f) giving the goods as a prize or otherwise making a gift of the goods;
and in relation to gas or water, those references shall be construed as including references to providing the service by which the gas or water is made available for use."

Section 2 provides that, where *"damage is caused wholly or partly by a defect in a product, every person*" listed in section 2(2) is liable for the damage. Where two or more persons are liable under the UKCPA, their liability to the claimant is joint and several,[609] although their liability inter se may be apportioned under the relevant contribution legislation in the UK.[610]

Potential claimants

The relevant strict product liability provisions of the UKCPA simply refer to 'the person who suffered the damage'. This wording is broad enough to entitle any person who has suffered damage as a result of a defective product, whether a consumer who purchased the product, a bystander or dependants of 'the person who suffered the damage', to recover damages under the UKCPA.

Goods

Section 1(2) of the UKCPA defines 'product' to mean:

> *"any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise;"*

Further, subsection 1(3) of the UKCPA provides that:

> *"For purposes of this Part*[611] *a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised."*

[609] Section 2(5).
[610] Winfield & Jolowicz 'Liability for Defective Products' (2014) at 308, and more generally in relation to apportionment between joint tortfeasors, Chapter 22.
[611] Part I of the UKCPA.

The concept 'goods' is further defined in section 45 to include *"substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle."*

While there is no doubt that agricultural products are intended to be included,[612] farmers do not fall easily into any of the categories of 'producer' as defined in section 1(2).[613] Winfield and Jolowicz argue that a farmer could perhaps be described as a 'producer…of raw material' under article 3(1) of the EU Directive of 1985.[614]

While the UKCPA covers information in the tangible form of a book, it appears that 'information' in general is not covered.[615] It is argued that this position was clearly the UK legislature's intention, however, it is questioned why certain provisions in the Bill of the UKCPA, which made this position clear, were removed.[616]

With respect to digital information, the position is not so clear, particularly in circumstances where it is difficult to draw a line between 'software' and 'hardware' of a product.[617] If we take the example of a computerised autopilot device in an aeroplane, it has to be questioned whether the result under the UKCPA should be any different where one of the following scenarios occur:

- The autopilot device causes the plane to crash due to failure of a hardware component of the device;
- The autopilot device causes the plane to crash due to a shortcoming or malfunction in its programming (i.e. software).

[612] By virtue of Directive 1999/34.
[613] Winfield & Jolowicz 'Liability for Defective Products' (2014) at 310.
[614] Ibid at footnote 124.
[615] 310.
[616] 310, citing Whittaker 'European Product Liability and Intellectual Products' (1989) 105 L.Q.R 125.
[617] Winfield & Jolowicz 'Liability for Defective Products' (2014) at 310.

Given the vast and ever-increasing number of tangible consumer products today that incorporate digital software components, the UKCPA would be excluding a large proportion of product liability claims from its scope if it were interpreted so as to exclude defective software. From a policy perspective, it would seem contrary to the promotion of consumer protection to exclude such claims, particularly with the advent of technology such as driverless motor vehicles which will require consumers to rely on advanced, built-in software to avoid life-threatening collisions.

Causation

Section 2 of the UKCPA simply provides that the damage be *"caused wholly or partly by a defect in a product".* The UKCPA provides no further guidance as to how causation ought to be established and in particular, to what degree of specificity a claimant is required to prove the nature of the alleged defect that caused the harm. As noted above at 3.3.1.4, the EU Directive does not assist in this regard and simply requires the claimant to *"prove the damage, the defect and the causal relationship between defect and damage."* The difficulties arising from this lack of precision in defining the mode of causation is evident from a number of decisions.

The case of *Richardson v LRC Products Ltd*[618] involved a claim by a woman who had fallen pregnant after a condom used by her husband had fractured during use. The court in this case held that the mere existence of a fracture in the condom was not in itself proof of a 'defect'. In coming to this conclusion, the court relied heavily on statistical evidence that condoms do, from time to time, fail and found that 'persons generally' do not expect that condoms would never fail.

[618] [2000] Lloyd's Rep Med 280.

In the case of *Foster v Biosil*[619] the court held, in relation to allegedly defective breast implants, that the claimant had to show precisely what the defect was. The implants in question had both ruptured within 7 months after they had been implanted. The court required that both the defect and the cause of that defect had to be established by the claimant. The court held that it is not sufficient, for purposes of section 3 of the UKCPA, to merely show that a product failed in an unsafe manner contrary to 'what persons generally are entitled to expect.' Rather, a claimant is also required to show, on balance of probabilities, the mechanism of the product's failure. The claimant was unable to prove the mechanism of the failure and was therefore unsuccessful.

The *Foster v Biosil* judgement has been subject to criticism on the basis that it, and its interpretation of *Richardson v LRC Products*, have introduced into the UKCPA's strict product liability regime the same evidentiary requirements as those in a common law negligence claim.[620]

Some years later, in *Ide v ATB Sales Ltd,*[621] the Court of Appeal had to determine the correct approach a court should take to proof of causation where alternative possibilities are presented to the court. In this case, the claimant had fallen off a mountain bike, which was imported to the UK by the defendant. The parties put forth two alternative causes of the accident, being either a defective handlebar or loss of control over the bike by the claimant causing damage to the handlebar in the fall.

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[619] (2001) 59 BMLR 178

[620] Bradley 'Proof of defect under the CPA 1987: Hufford v Samsung Electronics.' *Product Liability Alerter* (9 January 2015). Available [online]: http://www.hendersonchambers.co.uk/wp-content/uploads/2015/01/Matthew-Bradley-Product-Liability-Alerter-9-January-2015.pdf.

[621] [2008] EWCA Civ 424; [2009] RTR 8.

This case did not focus specifically on the UKCPA, rather it was concerned with the correct approach to establishing causation at common law where there are two competing theories, neither being improbable. The Court of Appeal, as per Thomas LJ, held that:

"As a matter of common sense it will usually be safe for a judge to conclude, where there are two competing theories before him neither of which is improbable, that having rejected one it is logical to accept the other as being the cause on the balance of probabilities."

Thomas LJ then compared this position under the general common law to the position under the UKCPA, stating that:[622]

> *"The application of this approach by a court in considering a claim under the Consumer Protection Act 1987 in respect of a defective product can often be simpler. Under ss. 2 and 3 of the Act if a person is injured by a product, his claim succeeds if he establishes there is a defect in the product and that defect caused the loss unless the defendant can rely on one of the statutory defences. In determining whether the loss or injury has been caused by a defect or by some other cause, although the process of reasoning may involve an explanation of how the defect was caused, the task of the court is simply to determine whether the loss was caused by the defect and not by another cause…that distinction is important and can make the task of the court a simpler one, as no doubt Parliament intended."*

In other words, it appears from *Ide v ATB Sales* that a claimant does not have to show the cause of the defect, merely that the harm was caused, on balance of probabilities, by the defect and not another cause. Further, the court seems to be saying that the causation enquiry under the UKCPA was intended by the legislature to be a more straightforward enquiry. This may indicate that causation under the UKCPA perhaps requires a less detailed investigation into the competing theories of causation put forward by the parties

[622] At par [7] and [19].

and simply requires that the court satisfy itself, on balance, that the defect was wholly or partly causative of the harm.

The recent decision in *Hufford v Samsung Electronics (UK) Ltd*[623] appears to have confirmed that a claimant is not required to prove the precise cause of the defect. Basing its decision on *Ide v ATB Sales Ltd*, the court held that:

> *"in relation to a claim under the [UKCPA], a claimant does not have to specify or identify with accuracy or precision the defect in the product he seeks to establish, and thus prove. It is enough for a claimant to prove the existence of a defect in broad or general terms, such as 'a defect in the electrics of the Lexus (motor car)."*

In fact, the decision in *Hufford v Samsung Electronics* appears to have gone even further than *Ide v ATB Sales* by stating that, in addition to there being no requirement to show the cause of the defect, a claimant need not even show with precision what the defect was. If this position is to be followed by courts in the future without qualification, it would greatly assist claimants in establishing 'defect' as well as causation for purposes of a UKCPA claim. Arguably, if the case of *Foster v Biosil* was heard today, following the decision in *Hufford v Samsung Electronics*, the claimant would likely have succeeded in establishing the breast implants were defective purely on the basis that they had ruptured within 7 months of implantation.

In some instances, UK courts have recognised exceptions to the traditional 'but for' test for factual causation, known as the 'material contribution to harm' and the 'material contribution to risk' tests. The material contribution to harm exception has its origins in nineteenth century nuisance cases in Scotland involving pollution of rivers and waterways

[623] [2014] EWHC 2956 (TCC).

by multiple factory owners.[624] It was held by courts that it is sufficient to establish factual causation by showing that a particular factory had 'materially contributed' to the pollution and it was irrelevant whether that factory's discharge into the waterway would have amounted to an actionable nuisance on its own.[625] This material contribution exception was again applied in a later Scottish case *Wardlaw v Bonnington Castings*[626] where an industrial worker was exposed to silica dust in the course of his employment which resulted in pneumoconiosis. The worker had contracted the disease due to atmospheric exposure at the industrial plant which was present partly due to breach of duty by the defendant and party due to no breach of duty. In this case, the court held that the defendant's negligence resulting in the presence of silica dust had made a 'material contribution' to the worker contracting the disease.

In a later Scottish case, *McGhee v National Coal Board*,[627] the material contribution to harm test resulted in the development of a 'material contribution to risk' test. In this case, a worker had developed dermatitis in the course of his work at the defendant's brick kiln due to exposure to brick dust. On the facts, it was found that the defendants had failed to provide adequate washing facilities, requiring workers to commute home in a dirty state. The worker was unable to prove, on balance of probabilities, that the defendant's failure to provide washing facilities would have prevented the dermatitis. The medical evidence was only able to state that washing facilities would have 'materially reduced' the risk of developing dermatitis. The worker argued that the 'material increase in risk' of developing

[624] Steel & Ibbetson 'More grief on uncertain causation in tort' (2011) Cambridge Law Journal at 453.
[625] Ibid, citing for example: *Duke of Buccleuch v Cowan* (1866) 5 M. 214, 216 (Lord-Justice Clerk), 223-224, 227-229 (Lord Cowan), 232-233 (Lord Benholme), 234-237 (Lord Neave); *Countess Dowager of Seafield v Kemp* (1899) 1 F. 402, 406 n.3; *Fleming v Gemmill* 1908 S.C. 340, 347, 350; *Brownlie & Son v Magistrates of Barrhead* 1923 S.C. 915, 927, 933, 935.
[626] 1955 S.C. 320; [1956] A.C. 613.
[627] 1973 S.C. (H.L.) 37; [1973] 1 W.L.R. 1.

dermatitis is the same as 'material contribution' to the disease itself. While this argument was rejected at first instance, the worker succeeded on appeal.

In cases involving a single wrongdoer where the facts point to more than one probable cause of harm, the UK Supreme Court has also applied the 'material contribution test' as an alternative to the traditional 'but-for' test. In *Sienkiewicz v Greif (UK) Ltd; Knowsley MBC v Willmore*[628] the plaintiffs had died of mesothelioma due to exposure to asbestos dust. The plaintiffs had been subject to low-level atmospheric exposure to asbestos as well as light exposure over a prolonged period at their respective places of employment. The UKSCA held that the contribution to risk of mesothelioma by the places of employment was sufficiently material to constitute factual causation against the employers. The reason for this exception is that medical science is currently not able to ascertain which asbestos fibre or fibres caused the mesothelioma, which usually only occurs many years after exposure. The *Sienkiewicz* exception has been developed in the context of asbestos-related mesothelioma cases where the plaintiff was subject to a tortious exposure to asbestos and other non-tortious, atmospheric/environmental exposures to asbestos. In *Fairchild v Glenhaven Funeral Services Ltd,*[629] the material contribution to risk test was also applied in the context of mesothelioma and multiple tortious exposures to asbestos caused by more than one wrongdoer. In other words, as long as it can be shown that a particular wrongdoer's negligence in exposing the claimant to asbestos materially increased the risk of mesothelioma, factual causation can be established against that particular wrongdoer.

[628] [2011] UKSC 10.
[629] [2002] UKHL 22.

More recently, English courts have applied the material contribution to harm test in the context of medical negligence or malpractice, where a person suffers from a harmful process arising from a natural cause, but exposure to the harm is prolonged due to medical malpractice.[630]

Aside from the cases dicussed above where a material contribution to harm or material contribution to risk of harm test has been applied in the context of causation, the traditional 'but for' test remains the applicable test for factual causation in the UK. It appears that the material contribution to harm or risk of harm test for causation has not yet been applied in any reported product liability case law in the UK. However, given the numerous instances where this test has been recognised in other contexts, it may only be a matter of time before it is extended, in appropriate cases, to product liability claims brought under the UKCPA or in negligence.

Harm and damages

The UKCPA defines 'damage' to mean "*death or personal injury or any loss of, or damage to any property (including land)*."[631] However, liability in respect of property damage is restricted by further provisions under the UKCPA.

In particular, section 5(2) provides that a claimant cannot recover compensation for "*the loss or damage to the product itself or the whole or any part of any product which has been supplied with the product in question comprised in it."* Further, section 5(4) provides that no liability arises unless the damages (excluding interest) would be a minimum of £275.00.[632]

[630] See, eg. *Bailey v Ministry of Defence* [2009] 1 WLR 1052; *Williams v Bermuda Hospitals Board* [2016] AC 888.
[631] Section 5(1).
[632] This is to give effect to article 9(2) of the EU Directive.

A further limitation lies in the fact that the UKCPA does not enable recovery of compensation for damage to property which is not of a description "*ordinarily intended for private use, occupation or consumption" and "intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption*."[633] A reason for this restriction on the type of property damage recoverable may be that strict product liability, from a policy perspective, is essentially aimed at protection of the vulnerable individual or consumer, rather than providing a remedy to sophisticated commercial entities.

Concept of defectiveness

In terms of section 3 of the UKCPA, a product is said to have a 'defect' if:

> *"(1) the safety of the product is not such as persons generally are entitled to expect; and for those purposes 'safety' in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.*
>
> *(2) In determining for the purposes of subsection (I) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including -*
>
> *(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;*
>
> *(b) what might reasonably be expected to be done with or in relation to the product; and*
>
> *(c) the time when the product was supplied by its producer to another;*

[633] Section 5(3).

> *and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question."*

A noteworthy judicial interpretation of the defectiveness standard under the UKCPA is the judgment of Burton J in *A v National Blood Authority*.[634] In this case, the National Blood Authority was held strictly liable for supplying blood infected with the Hepatitis C virus, the detection of which was not possible at the time of supply. In analysing the defectiveness standard, the court focused mainly on the formulation of the consumer expectations test in article 6 of the European Directive.

Burton J rejected academic criticism of the consumer expectations test, such as the argument that the strict liability under the Directive was nothing more than a strict form of negligence, particularly in the context of design defects.[635] He also rejected the commentary given by Lord Griffiths soon after the implementation of the Directive in the UK, in which the idea was promoted that some form of risk-utility balancing would have to be undertaken in the application of the article 6 defectiveness standard.[636] It should also be borne in mind that, at the time of this judgment, consumer expectations had already been widely rejected in the United States as a controlling test for defectiveness, in favour of a risk-utility approach to design and warning defects. Nevertheless, Burton J was determined to apply strict liability, with consumer expectations as the determinative standard for defectiveness. To do so, he sought guidance from a great number of foreign sources.

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[634] (2001) 3 All ER 289.

[635] Howells *Defect in English Law- Lessons for the harmonisation of European Product Liability*. In Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 141. See, for example, criticism by Stapleton *Product Liability* (1994).

[636] Lord Griffith. Val & Dorner 'Developments in English Product Liability Law: a Comparison with the American System' (1988) 62 *Tul LR* at 353.

The judge preferred the use of 'legitimate expectations' rather than 'entitled expectations'. He pointed out that the 'legitimate expectations' regarding product safety could be higher or lower than the expectations generally held by the public. There may also be cases where the public simply do not have any safety expectations regarding a specific products. He referred to the work of Bartl,[637] a German author, who argues that the judge is 'an informed representative of the public at large', and as such, can, therefore, determine whether a product conforms to a socially acceptable standard of safety.[638] The failure of a product to meet legitimate safety expectations does not simply provide evidence or an indication of defectiveness. Failure to meet legitimate expectations, in itself, is the defect.[639]

Burton J also referred to the interpretation of the defectiveness standard in article 6 by a Dutch court in *Scholten v Foundation Sanquin of Blood Supply.*[640] In that case, the claimant had contracted HIV through a blood transfusion during heart surgery. The virus was untraceable at the time of donation, presumably because the donor was within the so-called 'window period' after infection. In applying the consumer expectations standard, the Court had to determine what level of safety the claimant was entitled to expect in relation to the donor blood and held that:

> *"taking into account the vital importance of blood products and that in principle there is no alternative, the general public expects and is entitled to expect that blood products in the Netherlands have been 100 percent HIV-free for some time. The fact that there is a small chance that HIV could be transmitted via a blood transfusion, which the Foundation (defendant) estimates at one in a million, is in*

[637] Bartl *Produkthaftung nach neuem EG-Recht* (1989).
[638] This would typically be the function of a jury in the United States.
[639] Par [63]. See also: Howells *Defect in English Law- Lessons for the harmonisation of European Product Liability* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 142.
[640] NJ 1999, 621 (unreported, County Court of Amsterdam).

> *the opinion of the Court not general knowledge. It cannot, therefore, be said that the public does not or cannot be expected to have this expectation."* [641]

For this reason, the Dutch court held that the blood was defective.[642] The important principle from this judgment, which was cited in *A v National Blood Authority*[643] is that the public's expectations regarding a product's safety are not to be based on statistical expectations, but on what the individual consumer could legitimately expect. In this specific case, the individual consumer was entitled to expect that the donor blood is 100 percent safe. The fact that the public at large might have been aware of minor risks relating to blood transfusions is not relevant to what the individual consumer expects of this live-saving product, which is absolute safety.[644]

Returning to *A v National Blood Authority*, Burton J noted that article 6(1) of the Directive, as well as section 3(2) of the UKCPA, clearly provide that 'all the circumstances' may be taken into account in determination of defectiveness, which he interprets to mean 'all relevant circumstances', some of which are mentioned in article 6(1)(a)-(c), and others not.[645] Importantly, he stressed the fact that avoidability of risk was excluded from this 'basket' of factors.[646] He did so in an effort to distinguish the Directive liability which, according to the Preamble, is clearly intended to be faultless, from liability in negligence:

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[641] Translation derived from *A v National Blood Authority* [2001] 3 All ER 289, par 44(iii).
[642] However, the defendants succeeded in raising the so-called 'development risk defence' as found in article 7(e) of the EU Directive.
[643] (2001) 3 All ER 289.
[644] The position will arguably be different in cases involving products on which consumers to not depend so heavily for health or survival. In a 2008 case against major tobacco manufacturer BAT, the District Court of Amsterdam (LJN: BG7225, Rechtbank Amsterdam, 318074 / HA ZA 05-1691) held that cigarettes cannot be considered defective merely because it is detrimental to a smoker's health.[644] The Court referred to numerous highly publicised scientific reports, some dating back to the 1950's, which sparked great media attention and public debate on the risks of smoking. Based on this, it was held that the public has been generally aware of the dangers since, at least, the early 1960's and that health damage resulting from smoking is not sufficient to justify a finding of defectiveness and imposition of liability.
[645] [35].
[646] [63].

> *"In the comparative process, the claimant may point to a product which is safer, but which the producer shows to be produced five years later. Particularly, if no other contemporary product had these features, this is likely to be capable of being established, and insofar as such product has improved safety features which have only evolved later in time, they should be ignored, as a result of Article 6(2). The claimant might, however, want to allege that the later safety features could have been developed earlier by the producer. That would obviously amount to the claimant running the evidence of 'should have done'. This would however once again go to the issue of avoidability, which I have concluded to be outside the ambit of Article 6, and so once again if the claimant really wanted to do so he could run the point, but only in negligence."*[647]

Howells[648] argues that, while this interpretation may be justified on the grounds that the 'avoidability of risk' factor could easily reintroduce fault to the enquiry, it was nevertheless a bold decision, given the clear wording of Article 6 of the EU Directive. The judge reasoned that, if avoidability of risk was intended to be a factor, it would have been mentioned explicitly in the non-exclusive list of factors in article 6(1).

Burton J rejected the formal categorisation of defect types, as either manufacturing, design or warning defects, as done in the US *Restatement (Third)*, on the basis that 'there is no place for them in the Directive.'[649] Instead, he opted for a distinction between:

- products which have 'obviously dangerous characteristics by virtue of their very nature or intended use'; and
- other products, which are subcategorised as either standard or non-standard products.

[647] [72].
[648] Howells *Defect in English Law- Lessons for the harmonisation of European Product Liability* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 143.
[649] [39].

Products falling into the first category, such as knives, guns, poisons or alcohol, will not be held defective based on their particular inherent risks which are generally known to the public, since they cannot 'legitimately be expected' not to possess those characteristics. With regard to second category of products, Burton J distinguishes as follows:

> *"A standard product is one which is and performs as the producer intends. A non-standard product is one which is different, obviously because it is deficient or inferior in terms of safety, from the standard product."*[650]

Where a non-standard product incorporates a harmful characteristic, the issue of defectiveness is likely to be straightforward, primarily dealing with the question whether the harmful nature of the product had been brought to the general public's attention.[651] In the case of standard products, any alleged defect is likely to be one of design or resulting from an allegedly flawed system, and here:

> *"The question of presentation/time/circumstances of supply/social acceptability etc. will arise…The sole question will be safety for the foreseeable use. If there are any comparable products on the market, then it will obviously be relevant to compare the offending product with those other products, so as to identify, compare and contrast the relevant features…Price is obviously a significant factor in legitimate expectation, and may well be material in the comparative process. But again…there is no room in the basket for: (i) what the producer could have done differently; (ii) whether the producer could or could not have done the same as the others did."*[652]

On the basis of this analysis, Burton J found the packets of infected blood to be 'non-standard', since they deviated from the standard intended for those products by the

[650] [36].
[651] [68].
[652] [71].

producer.[653] He rejected an argument that all the blood products carried an equal risk of infection and are therefore equally defective as 'very philosophical'.[654] The fact that the general public had not been aware of the risks of blood being infected by a virus, seemed to be the decisive factor in the finding of defectiveness.[655] The absence of knowledge of risks rendered considerations of social utility of the product irrelevant in determining defectiveness.[656] Although the judge did not indicate what the position would have been if the public had been adequately warned of the risks, Howells[657] argues *"it is hard to conceive that a judge would hold blood to be defective when it was as safe as it could be and the public had been fully warned of inherent risks*."

Burton J approached defectiveness in an abstract manner: When the general public's perceptions regarding the product's level of safety are disappointed, that does not simply serve as proof of a defect, it is the defect. The approach focuses on the lack of information regarding the risk of contamination provided to the general public, rather than the actual, physical condition of the blood product.[658] Howells disagrees with the judge's need to point to a specific physical defect by singling out the contaminated blood as 'non-standard', since the mere existence of the risk, which disappoints the public expectation regarding blood products, would have been sufficient for a finding of defectiveness.[659] In other words, the same conclusion of defectiveness could have been reached under an abstract approach without drawing the standard/non-standard distinction.

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653 [65].
654 [65].
655 [65].
656 Whittaker *Liability for Products - English Law, French Law and European Harmonization* (2005) 489.
657 *Defect in English Law- Lessons for the harmonisation of European Product Liability* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 144.
658 146.
659 Ibid.

It is argued that Burton J's emphasis on the Directive's goal of imposing faultless liability and his determination to steer clear of any factor related to avoidability of risk, led him to adopt a very restrictive view of the article 6 provisions.[660] Whittaker argues that the judge's approach places undue weight on the knowledge of consumers regarding product risks at the time of supply in determining 'legitimate expectations' for purposes of defectiveness and suggests that:

> *"…a more natural interpretation is that they[661] make clear that a producer's conduct in relation to the risks which a product presents (including in relation to avoidance) must be assessed as at the date of supply…In sum, and with respect, Burton J's interpretation distorts the significance of the words used by article 6 so as to fit a misunderstanding of the significance of the Directive's recitals."*[662]

A year prior to this judgment, the Court of Appeal in *Abouzaid v Mothercare (UK) Ltd*[663] had to determine whether a fleece-lined sleeping bag, which injured a twelve-year-old boy when the elastic strap slipped and the buckle hit him in the eye, was defective in terms of the CPA. The court held that the claimant had established 'on balance' that the product was defective since its design carried the risk of injury and had not been warned against.[664] In the leading judgment, Pill LJ considered relevant to the defectiveness issue factors such as the knowledge of the risk and the practicalities of its avoidance by the manufacturer, whether in terms of warnings or in terms of the substitution of a non-elastic material.[665]

Despite the bold judgment of Burton J in *National Blood Authority* excluding any defectiveness factors that may be relevant to negligence, there are many authors that

[660] Whittaker *Liability for Products – English Law, French Law and European Harmonization* (2005) 490.
[661] The article 6 provisions.
[662] Whittaker *Liability for Products - English Law, French Law and European Harmonization* (2005) 490.
[663] (2000) All ER (D) 2436.
[664] [27].
[665] Ibid.

support a risk-benefit approach to defectiveness which, although focusing on the condition of the product rather than the conduct of the manufacturer, does overlap with the negligence enquiry to some extent. For example, Winfield & Jolowicz [666] argue that 'standard products' which, according to Burton J's classification are products that perform as the manufacturer intended, do often carry some inherent risk in their use, for instance certain medications or vehicles. Often these risks can only be eliminated or diminished by incorporating safety features at a cost disproportionate to the product's value and could possibly result in lower utility. Winfield and Jolowicz argue that:

> *"the relationship of the Act [CPA] with the law of negligence in these cases has not been fully explored, but it must surely be that the court is required to come to a judgment on whether the risks associated with the product in its present form are outweighed by the benefits that it brings, otherwise there would be liability for injuries caused by products rather than for injuries caused by defects in products, which would be neither socially acceptable nor within the scope of the Directive. While scientific evidence is no doubt relevant and often helpful there is no escaping the fact that in the last resort the judgment is a 'value' one: there is no scientific formula which will tell us whether the risk of allowing cars to be made without advanced safety systems is greater or less than the benefits obtained by having cheaper cars."*[667]

The value judgment described here involves a cost-benefit approach which has in fact also been acknowledged by the Department of Trade and Industry's explanatory note on the Directive. In a section relating to pharmaceutical drugs, the DTI explains this defectiveness approach as follows:

> *"The more active the medicine, and the greater its beneficial potential, the more extensive its effects are likely to be, and therefore the greater the chances of an adverse effect. A medicine used to treat a life threatening condition is likely to be*

[666] *Winfield & Jolowicz on Tort* (2014) 312.
[667] 312-313.

> *much more powerful than a medicine used in the treatment of a less serious condition, and the safety that one is reasonably entitled to expect of such a medicine may, therefore, be correspondingly lower."*[668]

Therefore, Winfield and Jolowicz hold the view that the determination of legitimate safety expectations inevitably involves consideration of how the product could have been improved with respect to safety. Further, while neither the Directive or the UKCPA distinguish between defect types and Burton J clearly rejected the US *Restatement (Third)*'s distinction, Deakin & Markesinis argue that is not impossible that English courts may in the future draw on the American approach by applying a consumer expectations standard for manufacturing defects and adopting a broader risk-utility standard for design and warning defects. [669] Based on Burton J's standard/non-standard distinction, the authors argue that a non-standard product, being one that deviates from the manufacturer's safety norms, could be seen as a manufacturing defect for which a strict consumer expectation standard would apply.[670] Indeed, as Burton J commented, a finding of defectiveness in such cases would, in the presence of a harmful characteristic "likely be straightforward."[671]

As regards design and warning defects, the authors argue that English courts could then apply a broader risk-utility test, allowing consideration of the social utility of a product compared to its risks. [672] The critical question here is whether this risk-utility approach will

[668] 313.
[669] Markesinis & Deakin *Markesinis and Deakin's Tort Law* (2012) 618.
[670] 618.
[671] [66].
[672] *Markesinis and Deakin's Tort Law* (2012) 618.

take into account 'avoidability of risk', as the *Restatement (Third)* openly does,[673] thereby potentially reintroducing negligence to the defectiveness enquiry.

The relevance of regulatory safety standards and an alternative, safer design in determining whether a product is defective was discussed in *Tesco v Pollard.*[674] In this case, the court held that a consumer is entitled to expect a child resistant cap on a bottle of dishwasher powder to be more difficult to open than a normal screw top, but nothing more specific can be said of the test for defectiveness. On the facts, the child resistant cap had not complied with the British Standard for such caps (which would have made it even more difficult to open), but it was nevertheless more difficult to open than an ordinary screw cap. The fact that the non-mandatory British Standard was not complied with did not, in itself, render the product defective. The cap was more difficult to open than normal caps, thereby meeting the expectations consumers are 'generally entitled' to, therefore the product was not defective.

The court's interpretation of 'what persons are generally entitled to expect' in this case appears to be correct. In reality, members of the public cannot be said to have any specific expectations as to the design standards that are in place for a specific product. Further, the level of safety that the public is generally entitled to expect of any product has to be judged on a case-by-case basis and a more specific test than this cannot be formulated.

While there are only a limited number of cases applying Part 1 of the UKCPA, it is clear from case law that English courts are keen to distinguish this statutory strict liability from

673 Section 2(b) and (c).
674 [2006] EWCA Civ 393; [2006] All ER (D) 186 (Apr).

the traditional negligence-based liability.[675] Further, while *A v National Blood Authority* had gone some way to defining the concept 'defect' in the case of a so-called 'non-standard' product,[676] English courts have not yet defined defectiveness in the case of a 'standard' product.[677] It could be argued that Burton J in *A v National Blood Authority* did not seek to develop a general rule for categorisation of product defects under the UKCPA but simply attempted to deal with the specific facts at hand, namely a single product in a batch of products that deviated from the standard intended by the producer for those products. It is important to note that Burton J's standard/non-standard classification of products does not appear to have been applied by English courts in subsequent cases. In fact, in the recent High Court case of *Wilkes v Depuy International Ltd*[678] Hickinbottom J held that the categorisation of products into 'standard' and 'non-standard' is both "*unnecessary and undesirable, positively unhelpful and potentially dangerous*"[679] and is a distraction from the true analysis required of a court, namely to determine the level of safety which persons generally are entitled to expect of a product taking into account all relevant circumstances.[680] It is argued that the vagueness of the concept 'defect' has resulted in fewer claims being brought under the UKCPA than might or should be and because of this, courts have had fewer opportunities to clarify the meaning of this core concept.[681]

[675] Howells *Defect in English Law- Lessons for the harmonisation of European Product Liability*. In Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 140. See, for example, *Abouzaid v Mothercare* (2000) All ER (D) 2436, in which the Court of Appeal imposed strict liability under the CPA for a faulty fleece liner whose buckle caused an injury to an infant. In its judgment, the court emphasised that the liability was not negligence-based.

[676] I.e. a product which deviates from what was intended by the manufacturer.

[677] Body 'Product Liability Claims under the Consumer Protection Act 1987: some practical problems' (2012) *Journal of Personal Injury Law* 79.

[678] See, eg. *Wilkes v Depuy International Ltd* [2016] EWHC 3096 (QB).

[679] [94].

[680] [96].

[681] 79.

Defences

Compliance with public regulation

The UKCPA provides in section 4(1)(a) a defence if it can be shown that a defect *"is attributable to compliance with any requirement imposed by or under any enactment of with any Community obligation."*

This defence does not mean that a producer can escape liability under the UKCPA by showing compliance with a regulation or other legal requirement that sets a minimum standard.[682] A product may, whilst complying with that minimum standard, have other features not contemplated or covered by that standard, which are found to be harmful.

The defence would not be available in circumstances where certain features or elements of a product are permitted, but not required, by law. Further, it would appear from the wording of this defence that it would not apply in the case of non-mandatory standards, for instance, best practice guidelines published by non-governmental industry bodies.

It should be noted here that a failure to comply with a non-mandatory product standard may not be decisive in determining liability. In *Tesco v Pollard*[683] a manufacturer was not held liable for supplying a bottle of dishwasher powder with a child resistant screw cap which did not meet the relevant non-mandatory British Standard. The court held that all that the public could legitimately expect was that the bottle would be more difficult to open, which it was in this case.

[682] *Winfield & Jolowicz on Tort* (2014) 317.
[683] [2006] EWCA Civ 393, discussed above at 3.3.1.6 in the context of defectiveness.

Absence of defect at time of supply

Section 4(1)(d) of the UKCPA provides a defence if a defendant can show that the defect did not exist in the product at the "relevant time". The "relevant time" is defined in section 4(2) as follows:

- with respect to electricity, the *"time at which it was generated, being a time before it was transmitted or distributed*";
- in relation to any other product:
  - in the case of a defendant within section 2(2): the time when that defendant supplied the product to another;
  - In the case of a defendant that does not fall within section 2(2):[684]
  - the time when the product was last supplied by a defendant within section(2)(2) to another.

This defence would cover the scenario where a product becomes defective after leaving the defendant's control due to misuse, tampering or fair wear and tear. If the claimant has established that the product was defective and caused harm, the onus is on the producer to raise and prove that the defect only occurred after the relevant time, for whatever reason.[685] If it is shown that the defect did exist at the relevant time, a defendant cannot rely on the possibility of intermediate inspection or examination by another person as a defence.[686]

[684] For instance, suppliers under section 2(3) who are liable due to failure to identify or provide details of their suppliers or the producer of the product within a reasonable period following a request by the person who suffered the damage.
[685] *Winfield & Jolowicz on Tort* (2014) 317.
[686] 318.

In *Terence Piper v JRI (Manufacturing) Limited*[687] the Court of Appeal had to consider whether a defective hip prosthesis, which fractured after implantation, was defective at the time it was supplied by the manufacturer to the hospital. Based on the manufacturer's evidence regarding its quality control processes and inspections, the court was satisfied that any defect in the surface of the prosthesis would have been identified by the manufacturer prior to delivery, even though there was no proof of inspection of the specific prosthesis that failed. The court held that it was not necessary for the manufacturer to prove the actual cause of the defect and when it arose.

Further, section 4(1)(f) provides a defence if a producer can show that:

> *"(f) that the defect—*
>
> *(i) constituted a defect in a product ("the subsequent product") in which the product in question had been comprised; and*
>
> *(ii) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product."*

This defence assists producers of components where their components alone are not defective but when incorporated into a subsequent or final product, the subsequent product becomes defective. It would also provide a defence to component producers where they have manufactured components based on specifications provided to them by the producer of a subsequent product. In this scenario, it is the producer of the subsequent product who was responsible for coordinating the incorporation of the components into the subsequent product and should bear responsibility for failure to provide the correct specifications to component producers.

[687] [2006] 92 BMLR 141.

Defect not reasonably discoverable

Section 4(1)(e) of the UKCPA provides a defence where a defendant can show:

> *"that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control;"*

It is argued that the wording of section 4(1)(e) essentially confines it to cases involving alleged design defects and that its application would be limited in the case of manufacturing defects.[688] Further, this defence should not have any application in cases where the defendant knew of the defect in question, in which case the producer supplies the product at his own risk.[689]

In *European Commission v United Kingdom*,[690] the European Commission challenged the wording of section 4(1)(e) of the UKCPA. The CJEU upheld section 4(1)(e) and in doing so, provided some guidance as to the scope of the defence under article 7(e) of the EU Directive (which section 4(1)(e) transposes into UK law).

In the UK Advocate General's opinion, presented in this case to the CJEU, it was argued that the relevant knowledge must be available in a language that is reasonably accessible and in a format that has a reasonably high degree of circulation.[691] Further, the Advocate General argued that factors such as the practicability and cost of the steps to eliminate or prevent the defect or the fact that the manufacturer did not keep up to date with scientific

[688] Markesinis & Deakin *Markesinis & Deakin's Tort Law* (2012) 622.
[689] Ibid, citing the decision of Burton J in *A v National Blood Authority* [2001] 3 All ER 289.
[690] Case C-300/95, [1997] ECR I-2649; [1997] All ER (EC) 391.
[691] At par 23.

knowledge in this area, as disclosed in specialist literature, are irrelevant considerations to section 7(e) of the EU Directive and section 4(1)(e) of the UKCPA.[692]

As noted above at 3.3.1.7(iii), it was held by the CJEU that the reference to "*scientific and technical knowledge*" in article 7(e) does not refer to the state of knowledge in the industrial sector within which the producer of the product operates, but rather "*the state of scientific and technical knowledge, including the most advanced level of such knowledge*" in general.[693] However, the CJEU qualified this by stating that the relevant knowledge must have been "accessible" at the time the product was put into circulation.[694] The CJEU conceded that the 'accessibility' of knowledge raises difficulties of interpretation, but held this is a matter for national courts to resolve.[695]

Apportionment of liability

Section 6(4) of the UKCPA provides that:

> *"Where any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage, the Law Reform (Contributory Negligence) Act 1945 and section 5 of the Fatal Accidents Act 1976 (contributory negligence) shall have effect as if the defect were the fault of every person liable by virtue of this Part for the damage caused by the defect."*

This provision has the effect of deeming the 'defect' in the product to be the 'fault' of the defendants liable under the UKCPA for harm caused by that defect. This is done to address the theoretical problem of apportioning liability as is done in negligence claims, under a strict liability regime where fault does not feature.

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[692] Ibid.
[693] *European Commission v United Kingdom* [1997] All E.R. (EC) 481 at [20]; [26].
[694] [29].
[695] Ibid.

There may be circumstances where the claimant's fault is so extreme that it amounts to the sole cause of the harm at law, resulting in a complete disallowance of damages.[696] By the same token, the claimant's conduct may amount to misuse to such a degree that the product is found not to be defective, even if it has caused harm.[697]

Prescription

The general principles regarding limitations of actions under the *Limitations Act* 1980 apply to claims under the UKCPA,[698] with two exceptions.[699] Firstly, a limitation period of three years applies in the case of property damage and personal injury, as opposed to the normal six year period. Secondly, the UKCPA provides for a long-stop provision whereby no liability arises if a claim is brought under the UKCPA more than 10 years (as opposed to the normal 15 years) after the defective product was supplied by the manufacturer to another.[700] The long-stop provision is aimed at limiting, to some extent, major class actions arising from defects that only manifest many years after a product was put into circulation, such as asbestos.[701]

As noted above at 3.3.1.7, the EU Directive's equivalent long-stop provision in article 10 refers to the time when the product was put into circulation. The CJEU held in *O'Byrne v Sanofi Pasteur MDS Limited and Sanofi Pasteur SA*[702] that "*a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed.*"

[696] *Winfield & Jolowicz on Tort* (2014) 318-319.
[697] 319.
[698] Schedule 1, Section 11A.
[699] Markesinis & Deakin Markesinis & Deakin's Tort Law (2012) 626-627.
[700] Schedule 1, Section 11A(3).
[701] *Winfield & Jolowicz on Tort* (2014) 319.
[702] Case C127/04

Contractual restriction of liability

Section 7 of the UKCPA expressly prohibits any limitation or exclusion of liability "*by any contract term, by any notice or by any other provision*." This applies in relation to any type of damage suffered.[703] In comparison, the UK Unfair *Contract Terms Act* 1977 voids all contractual exclusion clauses relating to death or personal injury caused by negligence, whereas the validity of a contractual exclusion clause for property damage or economic loss is subject to a reasonableness test.[704]

3.3.1.8(ii) Germany

The German *Product Liability Act 1989*[705] *('*GPLA*'),* which transposed the EU Directive into German law, came into force on 1 January 1990. The GPLA imposes faultless liability on producers for personal injury or property damage caused by defective products.[706] Neither the EU Directive nor the GPLA, which transposed the Directive into German law, affect any rights an injured person may have in terms of the pre-existing, well-established liability rules.[707] In this regard, it is worth noting that the German Drug Act 1976[708] ('GDA'), a result of the particularly dire impact of the Thalidomide tragedy in Germany, was the only special product liability regime in Europe at the time the Directive came into force, and thus remained unaffected.[709]

Under German tort law, liability for harm caused by a defective product is based on the breach of one of two duties: Either a general duty of care (*Verkehrspflicht*) under section 823(1) BGB, or a breach of a statutory duty (*Schutzgesetz*) under section 823 (2) BGB.

[703] Winfield & Jolowicz *Tort* (2014) 319; Markesinis & Deakin *Markesinis & Deakin's Tort Law* (2012) 626.
[704] Section 2.
[705] *Produkthaftungsgesetz* vom 15. Dezember 1989.
[706] Section 3 GPLA.
[707] Article 13.
[708] Arzneimittelgesetz vom 24. August 1976.
[709] 119. Article 13 of Directive provides that the Directive shall not affect a special liability system existing at the moment when the Directive is notified.

Liability in tort for breach of the statutory duty involves an intentional or negligent breach of a legislative or regulatory provision dealing with product safety.[710] Examples of these provisions can be found in a range of statutes such as the Product Safety Act, the Food and Consumer Goods Act, the Medicines Act and the Medical Devices Act.[711]

The majority of product liability claims in Germany today are based on the GPLA.[712] However, fault-based common law product liability remains relevant in practice where compensation is sought for damages which are not recoverable under the GPLA or where a plaintiff seeks to circumvent the limitations and liability caps imposed by the GPLA.[713] Further, in cases where a manufacturer is successful in relying on the so-called 'development risk defence' under the GPLA on the basis that the state of scientific and technical knowledge at the time the product was put into circulation was not such to enable discovery of the defect, a plaintiff may still be able to argue that the manufacturer breaches its duty of care to recall the product once the defect was discovered at some point after the product was put into circulation.[714]

Parties liable

Section 1(1) of the GPLA provides that:

> *"(1) In such case as a defective product causes a person's death, injury to his body or damage to his health, or damage to an item of property, the producer of*

[710] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 106.

[711] 'Produktsicherheitsgesetz vom 8 November 2011', 'Lebensmittel- und Bedarfsgegenstandegesetz vom 9 September 1997', 'Arzneimittelgesetz vom 12 Dezember 2005', 'Medizinproduktegesetz vom 7 August 2002.'

[712] Moelle & Behrendt 'Product Liability 2016 – Germany' (2016) *International Comparative Legal Guides.* Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/germany.

[713] Ibid. For instance, the GPLA does not permit recovery of damages for harm to goods or property used for business purposes. Further, where the harm is to privately used goods or property, the first 500 euro of any damages claim under the GPLA is not recoverable. See discussion below under 'Harm and Damages' in this section.

[714] Ibid. See discussion below under 'Defences' in this section.

the product has an obligation to compensate the injured person for the resulting damage..."

The GPLA defines "producer" in broad terms in section 4 as follows:

"(1) A producer within the meaning of this Act is a person who has produced the final product, a raw material or a component part. A producer is also anyone who by putting his name, trademark or other distinguishing feature on the product presents himself as its producer.

(2) A producer is also anyone who imports or takes into the area of application of the Agreement on the European Economic Area a product for sale, hire, leasing or any form of distribution with an economic purpose in the course of his business.

(3) Where the producer of the product cannot be identified, each supplier of the product shall be deemed to be its producer unless he informs the injured person within a month of his receipt of a demand to this effect of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the person referred to in paragraph 2, even if the name of the producer is known."[715]

According to this extended definition of producer, other members of the supply chain may be deemed producers for purposes of the GPLA, such as importers of defective products into the EU, component producers and parties who hold themselves out as manufacturers by applying their own name or trademark to products (so-called 'own-branders'). In circumstances where the actual manufacturer cannot be identified, each other supplier in the supply chain will be deemed producers unless that supplier informs the injured person of the identity of the producer or its own supplier within one month. The same applies if the

[715] *Product Liability Act* of 15 December 1989 (Federal Law Gazette I, p. 2198), last amended by Article 9 (3) of the Act of 19 July 2002 (Federal Law Gazette I, p. 2674), as translated by Flügel, E. Bundesministerium der Justiz und für Verbraucherschutz (2015) juris GmbH, Saarbrücken, available [online]: https://www.gesetze-im-internet.de/englisch_prodhaftg/englisch_prodhaftg.html.

importer into the EU cannot be identified, even if the identity of the non-EU producer is known.

Section 5 of the GPLA imposes joint and several liability in circumstances where two or more producers are liable for the same harm. Section 5 further provides that:

> *"In the relationship of the parties liable to pay damages, liability in damages as well as the extent of compensation to be paid depend, unless otherwise specified, on the circumstances, in particular to what extent the damage is caused mainly by one or the other party; in all other respects, Sections 421 to 425, Section 426 (1) second sentence and Section 426 (2) of the German Civil Code (Bürgerliches Gesetzbuch) shall apply."*[716]

Potential claimants

As noted above, section 1(1) of the GPLA imposes liability where a defective product causes *"a person's death, injury to his body or damage to his health, or damage to an item of property"* and provides that the producer of the product must compensate *"the injured person for the resulting damage."*

The wording of this section, as translated to English, seems to suggest at first glance that "the injured person" is the person who must bring the claim. However, the words 'resulting damage' arguably imply that the "injured person" could be another person who suffers loss as a result of "a person's death, injury to his body or damage to his health", such as a dependant of an injured breadwinner.

[716] *Product Liability Act* of 15 December 1989 (Federal Law Gazette I, p. 2198), last amended by Article 9 (3) of the Act of 19 July 2002 (Federal Law Gazette I, p. 2674), as translated by Flügel, E. Bundesministerium der Justiz und für Verbraucherschutz (2015) juris GmbH, Saarbrücken, available [online]: https://www.gesetze-im-internet.de/englisch_prodhaftg/englisch_prodhaftg.html.

Goods

The GPLA defines "product" in section 2 as *"all movables, even though incorporated into another movable or into an immovable, as well as electricity."*

This provision essentially mirrors the equivalent provision in article 2 of the EU Directive, with no further specific inclusions.

Causation

Section 1(4) of the GPLA provides that:

> *"The injured person bears the burden of proving the defect, the damage and the causal relationship between defect and damage. If it is disputed whether the obligation to pay compensation is excluded pursuant to paragraph 2 or 3, the producer bears the burden of proof."*

In other words, the claimant is required to make out a *prima facie* case under the GPLA by proving the defect, the harm and the causal link between the defect and harm, whereas the burden of establishing any of the available defences rests with the defendant.

As with all other EU member states, German courts apply their national rules regarding causation in relation to claims under the GPLA.[717] A discussion of the general principles of causation in German law is beyond the scope of this study. It is simply noted here that Germany's test for causation involves a two-fold approach, similar to English law, involving firstly a factual causation enquiry[718] and secondly, a normative question of legal cause.[719]

[717] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 116.
[718] The factual causation enquiry involves application of the condition sine qua non or 'but for' theory, also referred to in German as the Äquivalenztheorie".
[719] Markesinis & Unberath *The German Law of Torts: A Comparative Treatise* (2002) 103.

In some cases, the claimant will not be required to prove the exact nature of the product defect which caused harm. If a product malfunctions in "circumstances where one is entitled to expect that it does not fail this makes out a *prima facie* case of defect."[720] Lenze[721] describes the burden of proof here as follows: Once the *prima facie* case has been established, the burden shifts to the defendant who has to identify whether the malfunction is due to a manufacturing defect or design defect. If the product deviated from its intended design, indicating manufacturing error, the defendant would be strictly liable. If, however, the product malfunction is due to a design feature which the defendant can identify, the burden shifts back to the claimant who will have to show the possibility of a safer, alternative design.

Harm and damages

As noted above, section 1(1) of the GPLA imposes an obligation on a producer, where a defective product "*causes a person's death, injury to his body or damage to his health, or damage to an item of property,"* to compensate the injured person for *"the resulting damage."*

Section 1(1) then goes on to provide a qualification in the context of property damages, stating that liability to pay damages will only apply:

> *"if the damage was caused to an item of property other than the defective product and this other item of property is of a type ordinarily intended for private use or consumption und was used by the injured person mainly for his own private use or consumption.*

[720] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 115.
[721] 114-115.

The GPLA imposes a number of restrictions in relation to the damages recoverable in respect of property damage. Firstly, as indicated by the wording section 1(1), a claimant cannot recover loss arising from damage to the defective product itself. Secondly, loss arising from damage to goods or property used in a commercial context is not compensable, only goods or property used in a private context. For example, where a defective product causes damage to industrial machinery, that damage is not recoverable.

Thirdly, the first EUR 500 of any claim arising from damage to privately used property cannot be recovered under the GPLA. Arguably, this provision was introduced to prevent a raft of small and potentially frivolous claims overloading the court system. There is no maximum limit on the damages recoverable under the GPLA for property damage.

With respect to personal injury claims, section 10 of the GPLA imposes a cap on the recovery of damages of EUR 85 million for harm caused by the same defect.

Concept of defectiveness

Pursuant to section 3 of the GPLA:

> *"(1) A product has a defect when it does not provide the safety which one is entitled to expect, taking all circumstances into account, in particular*
>
> *a) its presentation,*
>
> *b) the use to which it could reasonably be expected that it would be put,*
>
> *c) the time when it was put into circulation.*
>
> *(2) A product is not defective for the sole reason that a better product is subsequently put into circulation."*[722]

[722] Product Liability Act of 15 December 1989 (Federal Law Gazette I, p. 2198), last amended by Article 9 (3) of the Act of 19 July 2002 (Federal Law Gazette I, p. 2674), as translated by Flügel, E.

Despite the fact that the EU Directive and therefore, the transposing GPLA, provide a single standard or definition for defect, German courts have (re-)established the tripartite definition of defect, as recognised under German tort law.[723] The implication of this resort to the tort law definitions is that strict liability may in reality only be applied to manufacturing defects, whereas courts may continue to apply the negligence-based standards for design and warning cases, notwithstanding the Directive's clear goal of introducing faultless liability.[724]

Although under an obligation to apply the consumer expectations standard under the GPLA, courts seem to only formally do so when determining defectiveness. In substance, the pre-existing standards under tort law for manufacturing and design defects seem to prevail in most cases, rendering the application of a standard based on 'what consumers are entitled to expect' largely redundant. Within the context of warning or instruction defects, the statutory test, however, plays a significant role.

Where a product departs from its intended design, application of the statutory consumer expectations test is generally regarded to be redundant in determining manufacturing defectiveness as there is no analytical benefit in saying that consumers are "*entitled to expect that a product does not depart from its intended design*."[725] While acknowledging that German courts are under an obligation to apply the consumer expectation standard,

Bundesministerium der Justiz und für Verbraucherschutz (2015) juris GmbH, Saarbrücken, available [online]: https://www.gesetze-im-internet.de/englisch_prodhaftg/englisch_prodhaftg.html.

[723] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 107, citing for example: BGH NJW 1995 2162 (Sparkling Water Bottle II); OLG Dusseldorf, 20.12.2002, 14 U 99/02 (Chocolate Bar); OLG Hamm NJW-RR 2001, 1248 (Log Flume).

[724] Ibid.

[725] 108.

Lenze criticises the circularity of the standard that results where courts, in reality, apply the tort law standard based on deviation from the product's intended design.[726]

German courts have not fleshed out the statutory definition of design defect, nor established which factors, or circumstances, could legitimately be considered under section 3 of the GPLA.[727] Consumer expectations as a standard for design defectiveness have been criticised by German courts for failing to provide assistance in cases where courts cannot identify any existing expectations regarding a product design in the consumer market, or where the existing expectations are so unrealistically high or not informed by the latest developments in technology.[728] Under general German tort law, when a product design breaches a safety statute or regulation, defectiveness will automatically be established.[729] However, compliance with these standards can usually be a relevant factor in the defectiveness issue under the GPLA, namely the legitimate safety expectations.[730] It may also be relevant to the state of the art processes in the context of the so-called "development risk defence" under section 1(2)5 of the GPLA.[731]

The real difficulty arises in cases where no statutory or regulatory safety standards exist, and no clear consumer expectations regarding the product design are discernible. Lenze[732] argues that the answer lies in article 6(2) of the *Directive*, which states that *"a product shall not be considered defective for the sole reason that a better product is*

[726] Reference is made to the circular reasoning in BGH NJW 1995, 2162 (Water Bottle II).
[727] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 108.
[728] 109.
[729] Ibid. In comparison, see, for instance, the English decision of *Tesco v Pollard* [2006] EWCA Civ 393; [2006] All ER (D) 186 (Apr), discussed above at 3.3.1.8(i).
[730] Moelle & Behrendt 'Product Liability 2016 – Germany' (2016) *International Comparative Legal Guides* at 3.3. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/germany.
[731] Ibid.
[732] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 110.

subsequently put into circulation." According to the author, this implies that existence of safer product alternatives at the time the product was put into circulation is a relevant factor in determining defectiveness, and therefore article 6(2) provides a basis for a "safer alternative design" test, or what the US Restatement (Third) refers to as a "reasonable alternative design".[733] Lenze argues in favour of a type of risk-benefit test, since a 'reasonable consumer does not and cannot legitimately expect a safer design if that entails a disproportionate loss of utility.'[734] Not only should the effect on a product's utility be considered, but the production cost implications of adopting a safer design alternative may be a relevant factor. Indeed, many writers[735] and courts[736] in Europe have acknowledged that price may be relevant to defectiveness, in the sense that they influence the safety expectations of the consumer.[737]

At first glance, this "safer, alternative design" test for design defectiveness, as would likely be applied under section 3 of the GPLA, may appear to be similar to the corresponding test under section 2(b) of the US *Restatement (Third).* However, Lenze emphasises that there would be differences in the plaintiff's evidentiary burden under these two instruments.[738] The *Restatement (Third)* requires the plaintiff to discharge a much broader, and arguably heavier, risk-utility burden, including proof of a technologically feasible and practical alternative design that would have prevented the harm as well as all the technical

733 Ibid.
734 Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005)109. See also: English case of ***Boogle v McDonald's*** (2002) EWHC 490 QB at [80].
735 Kullman & Pfister *Produzentenhaftung* (2002) Kz.3604/18a; Taschner & Frietsch *Produkthaftungsgesetz und EG-Produkt-haftungsrichlinie - Kommentar* (1990) note 55, Art. 6/20.
736 Austrian Supreme Court, Decision of 5 December 2002 – 8 Ob 192/99i (Extension Ladder) = 13 (2003) European Product Liability Rev. 40. See also: English case of *A v National Blood Authority (2001) 3 All ER 289* at [71].
737 Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 110.
738 111-112.

facts necessary to prove the reasonableness of such an alternative.[739] The question of whether the alternative design was reasonable and whether it should have been adopted by the manufacturer, involves a balancing act of a whole range of risk-utility factors, not limited to utility and production costs. The German claimant, on the other hand, merely has to show that the "*overall safety of the product could have been increased by altering the design in a practical manner and without an unbalanced loss of utility*."[740] The rules of pre-trial discovery in continental Europe does not allow the claimant to acquire all the detailed information necessary to present evidence as to the exact cost implications of adopting the proposed alternative design.[741]

Much uncertainty exists regarding the exact nature of the design defectiveness standard. Whether, and to what extent, risk-utility factors will play a role in the consumer expectations test under the GPLA, remains to be seen. What is clear is that German courts will have strong tendencies to resort to risk-utility factors commonly used under fault-based tort law, which could provide much-needed clarity in determining the 'safety a person is entitled to expect' of a product's design.

With respect to warning defects, it appears that courts resort to the same factors in determining defectiveness as they would apply in negligence.[742] It is worth noting in this context that the so-called 'learned intermediary defence' pursuant to which a manufacturer may be able to escape liability if a learned intermediary, such as a doctor, provided sufficient warnings of the product risk is not recognised under the GPLA or German tort

[739] Ibid.
[740] 112.
[741] Ibid.
[742] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005)120, citing for example: OLG Frankfurt NJW-RR 2001, 1471 (Beer); OLG Hamm JNW 2001, 1654 (Tobacco); OLG Dusseldorf 20/12/2002, 14 U 99/02 (Chocolate Bar); LG Bonn, 19.4.2004-606 7/03.

law.[743] German courts have emphasised the fact that consumers have a duty to consume products responsibility. In 2004, the Regional Court of Bonn considered a case brought by a claimant who allegedly suffered a breakdown due to a heart rhythm disorder related to excessive consumption of liquorice.[744] On the facts, the claimant had eaten a 400g pack of liquorice daily between November 2002 and February 2003. The claimant's case was that the producer ought to have provided a warning of the risks of excessive consumption and failure to do so constituted a product defect. In response to the producer's argument of excessive consumption, the claimant argued the fact that the product came in a 400 g size invited her to eat a packet daily.

The court held that the claimant's level of consumption was not relevant here, nor whether the consumption was the only or one of multiple causes of the claimant's condition, as the product did not contain any defect. This conclusion was upheld by the Cologne Court of Appeal, who considered further the regulatory compliance defence in article 7(d) of the EU Directive, as transposed by section 1(2)4 of the GPLA. On the facts it was held that the product complied with regulatory labelling requirements regarding glycyrrhin content. The Court of Appeal noted that mere regulatory compliance would not always be determinative in the defectiveness enquiry, particularly where those regulations were not recently introduced.[745]

German courts recognise that some products are inherently dangerous in that they are incapable of being designed any safer, carry a degree of risk which so outweighs the product's utility that it should not have been marketed at all.[746] Phrased in terms of the GPLA and the EU Directive, consumers are entitled to expect that a product, lacking a

[743] Moelle & Behrendt 'Product Liability 2016 – Germany' (2016) *International Comparative Legal Guides* at 1. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/germany.
[744] Az. 9 0 603/03, 19 April 2004.
[745] See discussion of this case by Shears 'The EU Product Liability Directive – twenty years on' (2007) *Journal of Business Law* 904.
[746] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005)112.

safer design alternative, should 'not be sold at all' if its overall risks outweigh its overall utility.[747] In cases where a certain product within a class of products is alleged to be inherently dangerous, such as pharmaceutical product, courts generally have little trouble in performing an overall risk-utility analysis of the product.[748] The analysis becomes more problematic in cases where the specific product represents an entire class of products and is commonly regarded as providing '*subjective pleasure'*.[749] Lenze queries:

> *"Can a court, for example, say whether the total social costs of alcohol, cigarettes, chocolate bars, and liquorice outweigh their total social utilities? Even if one accepts that courts engage in 'social ordering', they may not duly hold their view, or that of an expert, over the general consensus of the public and the preferences of consumers."*[750]

It is argued that these are the type of cases where consumer expectations will be most relevant to the risk-utility analysis in the context of design defects.[751]

Interestingly, many similarities can be drawn between the product liability rules under German tort law and the US *Restatement (Third) of Torts.*[752] Firstly, in contrast to the single definition of defect in *the Directive*, German courts and authors recognize the three main categories of defect set out in section 2 of *the Restatement (Third)*, namely manufacturing, design and warning defects. Secondly, a *prima facie* case of manufacturing defect requires proof, either direct or circumstantial, that the product departed from its intended design,[753] a formulation which basically mirrors the strict liability standard for manufacturing defects under section 2(a) of the *Restatement (Third)*. Importantly, the

[747] MunchKomm/Wagner S3/32.
[748] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 113.
[749] 113.
[750] Ibid.
[751] Ibid.
[752] 100.
[753] MunchKomm/Wagner S823/572.

claimant is required to show the manufacturing defect already existed at the time of marketing, and not at the time when it was put into circulation, as required by the *Restatement (Third)* as well as the *Directive.*[754]

Thirdly, in dealing with a tort claim based on an alleged design defect, the court will apply a two-step approach to negligence, strongly resembling the test for design defectiveness under section 2(b) of the *Restatement (Third)*. The court will firstly ask what the manufacturer could have done to reduce or eliminate the foreseeable risks of harm. After determining the so-called 'untaken precaution', the court will be tasked to judge whether the manufacturer should have taken this precaution. Essentially, a *prima facie* design case will be established by proving the existence of a safer and practical design alternative.[755] Courts will perform a risk-benefit analysis in which they consider the overall safety of the product design, as well as the additional safety and costs linked to the adoption of a safer design alternative.[756]

In the context of warning or instruction defects, German tort law imposes a duty on manufacturers to provide adequate warnings or instructions regarding product use in order to reduce unavoidable product risks or, at the very least, allowing consumers to make an informed choice when deciding whether to use the product and taking the attendant risks.[757] A *prima facie* case of negligence in the warning context will be made out where the plaintiff can prove that a warning regarding the product risk could, in hindsight,

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[754] Article 7(b). See Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 103.

[755] Lenze 'Zum Beweis des Produktfehlers' (2003) *Produkthaftpflicht International*, 6, citing LG Köln NJW 2005, 1195 (1200). See in comparison the 'reasonable alternative design' requirement in terms of section 2(b) of the *Restatement (Third*).

[756] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 104.

[757] Kullmann & Pfister *Produzentenhaftung (*2002*)* Kz. 1520/38.

reasonably have been included.[758] Naturally, the defendant will be able to rebut by proving that he could not have known of the risks at the time the product was marketed.[759] The duty to warn under the specific circumstances is generally determined by the level and nature of the risk as well as the probability of its manifestation, and, like the Restatement (Third),[760] excludes warnings regarding commonly known or obvious risks.[761]

Finally, German tort law allows for an inference of negligence to be drawn in cases where the plaintiff can show the damage was caused by an objective safety deficit of the product which existed at the time the product was put into commercial circulation.[762] Like section 3 of the *Restatement (Third*), the exact product defect need not be identified, yet it is required that the harm caused by the product defect, or objective safety deficit, be of the kind that would ordinarily be the result of a product defect.[763]

In an effort to clarify the test for defectiveness under article 6 of the EU Directive, as transposed by section 3 of the GPLA, the German Supreme Court has recently referred a question of interpretation to the CJEU. The ruling by the CJEU is discussed in detail above at 3.3.1.6 in the context of article 6 of the EU Directive. Following the CJEU's decision (joined cases C-503/13 and C-504/13) on the interpretation of this concept, the German Supreme Court ruled on 5 March 2015 that, where a product belongs to a particular group of products or the same production series that contains a potential defect (such as pacemakers and implantable cardioverter defibrillators), that product may be deemed

[758] BGHZ 116, 60, 70. (Toddler Tea).
[759] Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 105.
[760] See comment (j) of the Restatement (Third).
[761] BGH NJW 1986, 1863, 1864; BGH NJW 1996, 2224 (Lubricating Gel); OLG Hamm NJW-RR 2001, 1248 (Log Flume); OLG Dusseldorf, 20/12/2002, 14 U 99/02 (Chocolate Bar).
[762] BGH NJW 1996, 2506, 2507 (Furniture Polish); BGHZ 51, 91, 105 (Chicken Pest).
[763] Lenze 'Zum Beweis des Produktfehlers' (2003) *Produkthaftpflicht International*, 6. Lenze *German Product Liability Law* in Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005) 106.

defective without any evidence in a particular case that the product which has been implanted into the plaintiff, does have that defect.[764]

Defences

Section 1(2) and 1(3) of the GPLA list the defences that can be raised by a producer under the GPLA. These defences essentially mirror the defences contained in article 7 of the EU Directive.

Section 1(2) of the GPLA provides that:

> *(2) The producer's liability obligation is excluded if*
>
> 1. *he did not put the product into circulation,*
> 2. *under the circumstances it is probable that the defect which caused the damage did not exist at the time when the producer put the product into circulation,*
> 3. *the product was neither manufactured by him for sale or any other form of distribution for economic purpose nor manufactured or distributed by him in the course of his business,*
> 4. *the defect is due to compliance of the product with mandatory regulations at the time when the producer put the product into circulation or*
> 5. *the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the defect to be discovered.*

Section 1(3) provides a further defence to producers as follows:

[764] Moelle & Behrendt 'Product Liability 2016 – Germany' (2016) *International Comparative Legal Guides* at 8.1. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/germany.

> *"(3) The obligation to pay damages of the producer of a component part is also excluded if the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product. The first sentence shall apply to the producer of a raw material mutatis mutandis."*

Compliance with public regulation

In Germany, there is no general principle that compliance with regulatory or statutory requirements constitutes a defence for the producer.[765] A producer may however escape liability if it can show that the defect was caused by compliance with a mandatory regulation or product standard under section 1(2)4.

The GPLA's wording of this defence deviates in one aspect from the equivalent defence in article 7(d) of the EU Directive in that it requires the regulatory compliance to have been at the time the producer put the product into circulation. It is not entirely clear what purpose the inclusion of this time element in the GPLA's defence serves. Perhaps it simply clarifies the point that a product put into circulation 10 years ago should not be judged against regulatory standards in place today.

Compliance with regulatory product standards or requirements, while not determinative, may be relevant in the defectiveness enquiry of determining what persons generally are entitled to expect of the safety of a product, the state of the art processes and the level of care expected of a producer.[766] As noted above under the discussion of defectiveness in Germany, the Regional Court of Bonn in 2004 considered a case brought by a claimant who allegedly suffered a breakdown due to a heart rhythm disorder related to excessive

[765] Moelle & Behrendt 'Product Liability 2016 – Germany' (2016) *International Comparative Legal Guides* at 3.3. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/germany.
[766] Ibid.

consumption of liquorice.[767] On the facts, the claimant had eaten a 400g pack of liquorice daily between November 2002 and February 2003. On appeal, the Cologne Court of Appeal considered the regulatory compliance defence in article 7(d) of the EU Directive, as transposed by section 1(2)4 of the GPLA. On the facts it was held that the product had complied with regulatory labelling requirements regarding glycyrrhin content. The Court of Appeal commented that mere regulatory compliance would not always be determinative in the defectiveness enquiry, particularly where those regulations were not recently introduced.[768]

Absence of defect at time of supply

A producer may escape liability under the GPLA where the circumstances of the case justify an assumption that the product in question was defect-free at the time it was put into circulation.[769]

Defect not reasonably discoverable

A producer may escape liability under the GPLA by showing that the state of scientific and technical knowledge at the time the product was put into circulation did not enable the defect to be discovered. This defence is only available in relation to design defects, not manufacturing defects. It is worth noting that there is also no such defence available under the special strict liability regime for pharmaceutical products under the Federal Drug Act.

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[767] Az. 9 0 603/03, 19 April 2004.

[768] See discussion of this case by Shears 'The EU Product Liability Directive – twenty years on' (2007) *Journal of Business Law* 904.

[769] Moelle & Behrendt 'Product Liability 2016 – Germany' (2016) *International Comparative Legal Guides* at 3.1. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/germany.

Apportionment of liability

Section 6 of the GPLA provides for apportionment of liability based on the contributory fault of the injured person. Section 6 provides that:

> *(1) Where fault on the part of the injured person contributes to the occurrence of the damage, Section 254 of the German Civil Code shall apply; in case of damage to property, the fault of the person who exercises actual control over the item of property is deemed to be equal to the fault of the injured person.*
>
> *(2) The liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party. Section 5 second sentence shall apply mutatis mutandis.*

In extreme cases, the defence of contributory fault of the injured person may result in a complete disallowance of the claim.

Prescription

With respect to limitation periods, section 12 of the GPLA provides:

> *(1) A limitation period of three years from the day on which the party entitled to damages became aware, or should reasonably have become aware, of the damage, the defect and the identity of the party liable to pay damages shall apply to a claim pursuant to section 1.*
>
> *(2) In such case as negotiations on the compensation for damage to be paid are pending between the party liable to pay damages and the party entitled to damages, the limitation period shall be suspended until the continuation of the negotiations is refused.*
>
> *(3) In all other respects, the provisions of the German Civil Code on limitation shall apply mutatis mutandis.*

Further, section 13 of the GPLA imposes a long-stop limitation provision, stating that:

> *(1) The claim under Section 1 shall expire ten years from the time when the producer put into circulation the product which caused the damage. This shall not apply if a legal dispute or summary proceedings are pending on the claim.*
>
> *(2) Paragraph 1 first sentence shall not apply to claims that have been declared final and absolute or to claims based on other enforceable documents. The same shall apply to claims that are the subject of an out-of-court settlement or were recognised by means of a contractual declaration.*

Apart from these provisions, any limitation period in Germany will expire thirty years after the damage occurred, regardless of the knowledge of the potential claimant.

Contractual restriction of liability

Section 14 of the GPLA, titled 'Mandatory Nature' provides that:

> *"The liability of the producers pursuant to this Act may not be excluded or limited in advance. Any agreements to the contrary shall be null and void."*

This provision essentially mirrors the equivalent provision in article 12 of the EU Directive and reflects the policy stated in the preamble to the EU Directive of achieving "effective protection of consumers" by not allowing suppliers of defective products to merely contract out of their responsibility to injured persons.

3.4 AUSTRALIA

3.4.1 Introduction: The *Trade Practices Act* 1974 / The *Competition and Consumer Act* 1974, Schedule 2 *The Australian Consumer Law*

Prior to the introduction of strict product liability to the *Trade Practices Act 1974* in 1992, product liability under Australian common law could be based on breach of contract, a

claim in tort as governed by the principle in *Donoghue v Stevenson,*[770] or a claim for damages resulting from misleading and deceptive conduct.[771] In addition to these causes of action, the *Trade Practices Act* provided a statutory basis for product liability in Division 2A of Part V pursuant to which manufacturers and importers were required to honour contract-like obligations based on the terms implied in some contracts by statute, for example, the *Sale of Goods Act* 1923 (NSW).

Following much debate and initial industry opposition, Australia finally introduced Part VA to the *Trade Practices Act*, a strict liability rule based on the European *Directive,* which would align Australian product liability law with international trends.[772] Part VA imposed strict liability on a broad class of defendants, including manufacturers, own branders, assemblers and importers, for damage caused by defective goods. Contrary to suggestions by some authors, Part VA was not a codification of Australian product liability law; it merely provides an additional cause of action to the existing rights and remedies of consumers.[773]

Pursuant to section 75AD of Part VA of the TPA, liability attached if "a corporation, in trade or commerce, supplies goods manufactured by it, and they have a *defect*, and because of the defect, an individual suffers injuries." The corporation would be liable for the amount of the individual's loss and the individual may recover that loss by action against the corporation. Part VA incorporated a consumer expectations test for defectiveness which essentially mirrored the test under article 6 of the European Directive.

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[770] (1932) AC 562.
[771] Bianco *Modern Trends in Products Liability* (2002) 143; Harland 'Influence of European Law on Product Liability' (1995) *Sydney Law Review* at 339.
[772] Stapleton 'Restatement (Third) of Torts: An Anglo-Australian Perspective' (2000) 39 *Washburn Law Journal* at 144.
[773] Boas 'Part VA of the Trade Practices Act: A failure to adequately reform product liability law in Australia' (1994) 6 *Bond Law Review* at 112; Harland 'Influence of European Law on Product Liability' (1995) *Sydney Law Review* at 337.

Stapleton[774] doubts whether Part VA has had much or any reformist effect in this field. She argues that, although it cannot be determined how many claims have been instituted on the basis of Part VA since its introduction in 1992, the fact that liability under Part VA has been imposed only once by a court might be indicative of its limited impact on the product liability system in Australia.[775] Stapleton notes that:

> *"In short, and just as with the experience with the Product Liability Directive throughout the EU, Part VA does not seem to have had any discernible impact one way or the other on: the rate of product claims, court filings or reported cases, availability of insurance, the level of research and development, quality control, record-keeping and product recall strategies, content of advertising, or product warnings."*[776]

On 24 June 2010, the Australian parliament passed the second of its Trade Practices Act Amendment bills, being the Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010 (Cth). The effect of this legislation was that from 1 January 2011, the *Trade Practices Act* 1974 was renamed the *Competition and Consumer Act* 2010 ('CCA'). The amendment also introduced the Australian Consumer Law ('ACL'), a single national law covering consumer protection and fair trading, which applies consistently nationally and across each state and Territory. The ACL is set out in Schedule 2 of the CCA. The ACL replaced consumer protection and fair trading provisions in 20 existing national, state and territory laws with a single, national consumer law. The states and territories subsequently introduced legislation to apply the ACL as the law of each state or territory. Part 3-5 of the

[774] 'Restatement (Third) of Torts: An Anglo-Australian Perspective' (2000) 39 *Washburn Law Journal* at 367, citing, for example, Boas 'Part VA of the Trade Practices Act: A failure to adequately reform product liability law in Australia' (1994) 6 *Bond Law Review* at 112 - 147.

[775] Stapleton 'Restatement (Third) of Torts: An Anglo-Australian Perspective' (2000) 39 *Washburn Law Journal* at 367, citing *Ryan v Great Lakes Council* [1999] FCA 177. The defence has subsequently been upheld only once more, in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC1 128.

[776] Stapleton 'Restatement (Third) of Torts: An Anglo-Australian Perspective' (2000) 39 Washb*urn Law Journal* at 367-8.

ACL now contains the strict product liability provisions for damages against the manufacturer, previously set out in Part VA of the TPA.

Section 131C of the CCA preserves the rights of consumers to bring claims based in contract or tort, which are often pleaded in the alternative to a strict product liability claim. From a practical perspective, liability is generally easier to establish under the CCA than in negligence as it does not require the plaintiff to establish breach of duty of reasonable care by the manufacturer. However, in certain circumstances damages recoverable in negligence may be more favourable to a plaintiff than under the ACL due to statutory restrictions on damages under this legislation. If both causes of action succeed, the plaintiff can elect a remedy. The election would have to be made no later than the time of seeking final judgment in the proceedings.[777] In *Graham Barclay Oysters v Ryan*,[778] the court held that:

> *"The relationship between claims made for relief in respect of contravention of provisions of the Trade Practices Act and common law claims, whether in negligence, deceit or otherwise, has not been examined in detail in any decision of this Court and was not the subject of detailed argument in the present matters. In those circumstances, we proceed on the assumption (which was not challenged) that a plaintiff may frame alternative claims in negligence and under the provisions of the Trade Practices Act relied on here. But it is to be recognised that claims of the kind which were made in these matters, in negligence and under the Trade Practices Act, were alternative claims, and that, if a group member succeeds in establishing the elements of both claims, that group member must elect which*

[777] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [130], which was subsequently followed in *Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower* [2006] NSWSC 512 at [311], where the plaintiff had made no submissions at trial as to whether he wished to claim damages at common law or under section 75AD of the Trade Practices Act. Accordingly, the court entered judgment in favour of the plaintiff for personal injuries sustained, but granted the plaintiff leave to make submissions on the question of the election between the two alternative claims before determining the amount of that judgment.

[778] 2002) 211 CLR 540.

> *remedy will be taken.*[779] *That election would have to be made no later than at the time of seeking final judgment in the action."*[780]

Accordingly, consideration should always be given to pleading negligence in the alternative to a claim under the ACL and CCA.

It is likely that judicial interpretation of Part 3-5 of the ACL will draw heavily on case law interpreting the corresponding provisions under the former TPA. Although it has no proper legal status, a publication by the Commonwealth Treasury Office titled 'The Australian Consumer Law: A Guide to Provisions' (2010) states that the differences in the drafting and order of provisions between Part 3-5 and the former Part VA reflect changes to drafting conventions since 1992 and are not intended to effect the operation and previous judicial interpretations of these provisions. For purposes of the discussion of the Australian legislative framework, the relevant product liability provisions of the current ACL will be discussed with reference, where applicable, to case law interpreting the corresponding provisions under the former TPA.

3.4.1.1 Parties liable

The ACL provides a number of actions for claiming damages for harm caused by defective goods as follows:

- claims against 'manufacturers' for:
  - supplying a good with a 'safety defect' (section 138);
  - supplying goods that breach the consumer guarantees under the ACL (section 271)
- claims against 'suppliers' of goods for supplying goods that breach the implied consumer guarantees under the ACL (section 259).

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[779] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at [19].
[780] [130].

Pursuant to section 138, a 'manufacturer' is liable to compensate an individual if the manufacturer supplies goods in trade or commerce, those goods have a 'safety defect', and the individual suffers injuries because of the safety defect.[781] A manufacturer is also liable to compensate a person if:

- an individual other than the person suffers injuries or dies because of the safety defect and the person suffers loss or damage due to the injuries or death;[782]
- other goods (also of a kind usually acquired for personal, domestic or household use or consumption) are damaged or destroyed due to the safety defect;[783] or
- land, buildings or fixtures ordinarily acquired for private use are destroyed or damaged because of the safety defect.[784]

Like the former TPA, the ACL provides an extended definition of 'manufacturer', which includes:[785]

- a person who "grows, extracts, produces, processes or assembles goods";
- a person who holds themselves out to the public as the manufacturer;
- a person who causes or permits their name, the name by which they carry on business or their brand or mark to be applied to goods that they supply;[786]
- a person who causes or permits someone else to hold them out to the public as the manufacturer, in connection with the supply, promotion or possible supply of goods by that other person;

[781] Section 138.
[782] Section 139. Section 139 is considered to be for the benefit of dependents of the injured or deceased person (*Stegenga v J Corp Pty Ltd* [1999] ATPR 41-695).
[783] Section 140.
[784] Section 141.
[785] Section 7.
[786] See, for example: *Glendale Chemical Products Pty Ltd v ACCC* (1999) ATPR a company marketed a domestic chemical and was held liable as a *manufacturer* under the TPA as it had lent its name and logo to the product.

- an importer, if at the time of importation, the actual manufacturer does not have an Australian place of business.

In the case of *Glendale Chemical Products Pty Ltd v ACCC*[787] it was held that repackaging and labelling of products fall within the concepts of processing and assembling.

In *Leeks v FXC Corporation*[788] the plaintiff brought proceedings against the actual and deemed manufacturer of a defective product under the former TPA. The Court held that multiple deemed manufacturers could be subject to actions because the former TPA definitions of 'manufacturer' were not mutually exclusive. The position would arguably be the same under the ACL's extended definition of manufacturer. Liability of defendants is joint and several.[789]

A person who wishes to institute a defective goods action against a manufacturer but does not know who the manufacturer of the goods is, may write to the supplier or each known supplier of the goods, requesting particulars identifying the manufacturer of the goods.[790] If, 30 days after the person made the request(s), the person still does not know who the manufacturer of the goods is, each supplier to whom the request was made and failed to comply with the request is taken, for the purposes of the defective goods liability action, to be the manufacturer of the goods.[791]

Section 271 provides a further action against a ‘manufacturer’ for damages in circumstances where the goods do not comply with a consumer guarantee implied under the ACL. Pursuant to section 271(1), if the consumer guarantee under section 54 applies

[787] (1998) 90 FCR 40.
[788] (2002) ATPR.
[789] Section 144.
[790] Section 147(1).
[791] Section 147(2).

to a supply of goods and the guarantee is not complied with, 'an affected person' in relation to the goods may recover damages from the manufacturer.[792] Liability under this section does not arise if the guarantee is not complied with only because of:

- an act, omission or representation by a person other than the manufacturer or an employee or agent of the manufacturer; or
- a cause, outside of human control, that occurred after the goods left the manufacturer's control; or
- the fact that the supplier's price charged for the goods exceeded the manufacturer's recommended retail price or the average retail price.[793]

Pursuant to section 271(3), if a 'person' supplies goods by description to a consumer, and that description was applied to the goods by or on behalf of the manufacturer, or with the manufacturer's consent, and the guarantee under section 56 applies, and it is not complied with, an affected person may claim damages from the manufacturer. This does not apply if the guarantee is not complied with solely due to:

- an act, default or omission of a person other than the manufacturer or an employee or agent of the manufacturer; or
- a cause, outside of human control, that occurred after the goods left the manufacturer's control.[794]

Pursuant to section 271(5), if the guarantee under section 58 or 59(1) applies to the supply and the guarantee is not complied with, an 'affected person' in relation to the goods may recover damages from the manufacturer. An affected person is entitled to recover

[792] Section 271(1).
[793] Section 271(2).
[794] Section 271(4).

damages against the manufacturer for a reduction in the value of the goods and any loss or damage suffered due to failure to comply with the relevant guarantee, if it was reasonably foreseeable that the affected person would suffer such loss or damage due to failure to comply with the guarantee.[795]

Pursuant to section 259 of the ACL, a 'consumer' may take action against a 'supplier' who supplies goods in trade or commerce and a consumer guarantee that applies to the supply under the ACL (other than section 58 and 59(1)) is not complied with.[796] In circumstances where the failure to comply with the guarantee cannot be remedied or is a 'major failure', the consumer may recover damages for any loss or damage suffered due to the failure to comply with the guarantee, provided it was reasonably foreseeable that the consumer would suffer such loss or damage due to a failure to comply with the guarantee.[797]

However, the consumer may not recover damages from the supplier if the failure to comply with the guarantee was solely due to a cause outside of human control that occurred after the goods left the supplier's control.[798] The consumer may take action whether or not the goods are in their original packaging.[799]

Section 236(1) of the ACL provides a further general avenue for redress where a person suffers loss or damage due to the conduct of 'another person' and that conduct contravened any provision of Chapter 2 or 3 of the ACL, which include the implied consumer guarantees and safety standards, the person may recover damages against that 'other person', or 'any person involved in the contravention.'

[795] Section 272.
[796] Section 259(1).
[797] Section 259(4).
[798] Section 259(5).
[799] Section 259(7).

The consumer guarantees implied by the ACL are discussed below at 3.4.1.6 in the context of product defectiveness.

3.4.1.2 Potential claimants

For purposes of an action against the 'manufacturer' supplying a good with a 'safety defect' under section 138, the ACL provides that an 'injured individual' or 'a person other than an injured individual' may bring a claim. This wording is broad enough to include claims by dependants of a breadwinner who is injured by the defective good. Use of the word 'individual' is also broad enough to include product users who did not purchase the product and bystanders who are harmed by the use of the good by another person.

With respect to an action against a manufacturer for supplying a good that does not comply with the implied consumer guarantees, the ACL provides that 'an affected person in relation to the goods' may bring an action against the manufacturer. This is also broad enough to include dependants of a breadwinner who is injured by the good, product users who did not purchase the product and bystanders harmed by the use of the good by another person.

For purposes of an action against 'suppliers' under section 259 for supplying, in trade or commerce, a good that does not comply with the implied consumer guarantees, the ACL provides that a 'consumer' may bring an action against the supplier.

The term 'supply' in relation to goods is defined broadly by the ACL to include "supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase".

The ACL defines a 'consumer' in relation to goods as follows:

> *"3(1) A person is taken to have acquired particular goods as a consumer if, and only if:*
>
> *(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:*
>
> *(i) $40,000; or*
>
> *(ii) if a greater amount is prescribed for the purposes of this paragraph - that greater amount; or*
>
> *(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or*
>
> *(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.*
>
> *(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:*
>
> *(a) for the purpose of re-supply; or*
>
> *(b) for the purpose of using them up or transforming them, in trade or commerce:*
>
> *(i) in the course of a process of production or manufacture; or*
>
> *(ii) in the course of repairing or treating other goods or fixtures on land."*

In other words, the action against suppliers under section 259 is only available to consumers who 'acquire' the goods directly from the supplier. The ACL defines 'acquire' in section 2 to include *"acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase."*

Based on the author's experience, Australian courts generally do not apply the requirement that goods be 'of a kind ordinarily acquired for personal, domestic or household use or consumption' strictly and many goods would still qualify as being of a kind normally acquired for domestic or personal use, even if they were in fact acquired for a commercial purpose or used in a non-domestic setting in that instance. For instance, in *Carpet Call v Chan*,[800] a case brought under the former TPA, domestic grade carpet supplied to a nightclub was held to be a good ordinarily acquired for domestic use. Further, consider for example an internet modem supplied by a mobile network company to a consumer who conducts a business from home. Even where the consumer holds a business internet account, the modem would arguably still qualify as a good 'of a kind ordinarily acquired for domestic or personal use', as the same modem is also widely supplied to, and used by, residential customers.

In *Cook v Pasminco Ltd*[801] the plaintiffs brought claims in negligence and nuisance, as well as under sections 75AD and 75AG of the former TPA (the equivalent of section 138 under the ACL) due to alleged injury to their health after being exposed to emissions of noxious fumes from the defendants' industrial plants. For purposes of the TPA claims, the Federal Court had to consider, amongst other things, whether the fume emissions were 'goods', 'manufactured' by the defendants and 'supplied in trade or commerce' within the meaning of the TPA and if so, whether those goods contained a 'defect'.

With respect to the claims under section 75AD and 75AG, the plaintiffs alleged that the emissions were 'goods manufactured' by the defendants and 'supplied' by the defendants

[800] (1987) ASC 55-553; (1987) ATPR (Digest) 46-025.
[801] [2000] FCA 677 (12 May 2000).

to the plaintiffs, that the goods had a 'defect', being a harmful impact on human health and damaging to safety of land, buildings or fixtures owned by the plaintiffs.

The court firstly considered the concept 'supply', which was defined in section 4(1) of the TPA as follows:

> *" 'supply' when used as a verb, includes:*
>
> *"(a) in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and*
>
> *(b) in relation to services – provide, grant or confer…"*

The court held that a necessary element of the 'supply' concept is that it is a 'bilateral and consensual process' which is not the case here as the plaintiffs allege the toxic emissions were inflicted on them without their consent.[802] The court found that no evidence could establish that the emissions passed from the defendants as part of a 'consensual transaction or dealing' and therefore, it could not be established that there was a 'supply' for purposes of section 75AD and 75AG.[803]

With respect to the requirement that the 'supply' must have occurred 'in trade or commerce', the court held that this expression does not only refer to the supplier's general commercial activities, rather the supply itself must form part of an activity or transaction which has a 'trading or commercial character.'[804]

As to the question whether the emissions had a 'defect' in them, the court referred to the definition of 'defect' in section 75AC(1), which provides:

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[802] At [24].
[803] At [27].
[804] [28] - [29].

> *"For the purposes of this Part [Part VA in which ss 75AD and 75AG occur], goods have a defect if their safety is not such as persons generally are entitled to expect."*

The court held that the plaintiffs would have to establish that the emissions were unsafe because of the presence of a defect in them. However, the plaintiffs were alleging in this case that the emissions were unsafe because they were true to their nature, not because of a defect in them.[805] Accordingly, the plaintiffs would fail on this point as well.[806]

In light of these conclusions, the court did not deem it necessary to consider the concept 'goods' and 'manufactured'.[807] The TPA claims were struck out.

A person who purchases goods by way of auction is not entitled to bring a claim for damages based on breach of implied consumer guarantees under sections 271 and 259. The reason for this is that the implied consumer guarantees under the ACL do not apply to goods sold by way of auction.

The ACL defines a 'sale by auction' to mean a sale that is conducted by an agent of the person who is supplying the goods, whether that agent conducts the sale in person or by electronic means.[808] A question arising from the auction exclusion is whether goods sold via online auction sites, such as eBay, are excluded from the implied consumer guarantees. The author recently acted for an Australian retailer who purchases second-hand electronic goods from auction houses and resells them to consumers on eBay. One of these goods, a second-hand (or possibly third-hand) electronic mediaboard, malfunctioned causing an electrical fire which burnt down the plaintiff-consumer's home. In

[805] [32].
[806] [32].
[808] Section 2(1).

order to determine whether the ACL's consumer guarantees applied to the retailer's eBay sale to the consumer, it had to be determined whether eBay acted as the retailer's agent.

The eBay User Agreement, as provided on its website, states as follows:

> *"Although we are commonly referred to as an online auction website, it is important to realise that we are not a traditional 'auctioneer'. Instead, our site merely acts as an online venue to allow members to communicate and offer, sell and buy just about anything, at any time, from anywhere, in a variety of formats, including a fixed price format and an auction-style format commonly referred to as an 'online auction."*[809]

The Australian Competition and Consumer Commission advises on its website:

> *"When consumers purchase goods from an online auction site, the seller, even a private individual, may need to abide by consumer guarantees as the websites do not generally act as an agent for the person selling the goods."*[810]

A comment by the Queensland Office of Fair Trading on its website further states:

> *"eBay sales are not considered to be an auction as eBay does not act as an agent on behalf of the seller. Therefore, eBay sales are covered by the consumer guarantees under the Australian Consumer Law."*[811]

While this point has not yet been judicially tested, based on eBay's terms and conditions, coupled with the underlying consumer protectionist policy of the ACL and the commentary of consumer protection authorities, sales via eBay to Australian consumers would arguably not be excluded from the application of the ACL's consumer guarantees. The position may be different in respect of other online auction sites where the site operator does act in the traditional auction sense as agent of the vendor.

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[809] http://pages.ebay.com.au/help/policies/user-agreement.html.
[810] Consumer Action Law Centre, Victoria, Australia. Media release: Is eBay selling consumers short? [Online] Available: http://consumeraction.org.au/media-release-is-ebay-selling-consumers-short/.
[811] Ibid.

3.4.1.3 Goods

The ACL provides a broad definition of 'goods' in section 2, which includes:

> *"(a) ships, aircraft and other vehicles; and*
> *(b) animals, including fish; and*
> *(c) minerals, trees and crops, whether on, under or attached to land or not; and*
> *(d) gas and electricity; and*
> *(e) computer software; and*
> *(f) second-hand goods; and*
> *(g) any component part of, or accessory to, goods."*[812]

Section 8 of the ACL provides that goods are taken to be supplied to a consumer even if they have become affixed to land or premises at the time of supply.

The definition of 'goods' under the ACL expands on the definition of 'goods' under the former TPA in that it now includes specific references to computer software, second-hand goods and any component part of, or accessory to goods. With respect to computer programmes, the addition to the definition overcomes any uncertainty as to whether they are 'goods'.[813] Other than these additions, the definition of 'goods' under the ACL does not appear to expand the scope of the original definition of 'goods' under the former TPA.[814]

It has been held by the Australian Federal court that the inclusion of 'electricity' in the definition of 'goods' under the TPA does not mean that 'goods' include encoded electrical signals such as electronically disseminated financial information sent from a retail supplier of stock exchange information to its subscribers' computers.[815] While the information is

[812] Section 1.
[813] Miller 'Australian Competition and Consumer Law Annotated' (2016) 14810, citing *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460; 97 ALR 513.
[814] Miller 'Australian Competition and Consumer Law Annotated' (2016) 1480.
[815] *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460; 97 ALR 513, which dealt contraventions of TPA provisions relating to prohibited trade practices.

sent by way of real-time encoded electrical impulses, which are received and interpreted by the subscribers' computers, the ordinary meaning of 'goods' cannot be extended by interpretation to include encoded electrical signals.[816] The subscribers to the stock exchange information cannot properly be characterised as purchasers of 'electricity' and therefore 'goods', rather they are purchasers of electronic information.[817] It is unclear whether Australian courts would hold that information in itself, as opposed to the product into which it is incorporated, such as software, would qualify as "goods".

In relation to the supply of human blood in the course of a blood transfusion by a hospital during an operation, it has been held, under the former TPA, that the supply was not a supply of 'goods', rather a supply of 'services'.[818] However, it should be noted that this case turned on the particular facts and is not authority for a general proposition that the supply of blood will never constitute a supply of 'goods'.[819]

3.4.1.4 Causation

The ACL does not provide any specific guidance as to the test for causation to be applied. The general principles of causation, as applied under Australian tort law, apply in the case of strict product liability claims under the ACL. The High Court decision of *Robinson Helicopter Company Incorporated v McDermott,*[820] which is discussed in detail below at 3.4.1.6 in the context of defectiveness, has recently confirmed the test for causation in negligence and statutory product liability claims. While the causation analysis may require the drawing of inferences, particularly where it is difficult to identify the cause of damage from multiple possible causes, establishing causation requires proof, on a balance of

[816] [20].
[817] Ibid.
[818] *E v Australian Red Cross Soc* (1991) 31 FCR 299; 105 ALR 53.
[819] Miller 'Australian Competition and Consumer Law Annotated' (2016) 1481.
[820] [2016] HCA 22 (8 June 2016).

probabilities, that a breach of duty in negligence (or a product defect) was the cause of the damage.[821]

3.4.1.5 Harm and damages

As noted above at 3.4.1.1, a manufacturer of a product with a 'safety defect' may be liable to pay compensation for injuries, death, economic loss as a result of death and damage to property (other than the defective good).[822] A supplier of goods that breach implied consumer guarantees may be held liable for 'damages' under the ACL.[823]

Part VIB of the CCA restricts the amount of personal injury damages recoverable for economic loss, loss of earning capacity, superannuation entitlements, gratuitous attendant care and non-economic loss (pain and suffering, loss of amenities of life and disfigurement) and interest.

For instance, non-economic loss is capped at $250,000.00 (subject to inflation adjustments, which in 2015 amounted to approximately $270,000.00) for the most extreme cases.[824] Where the injury is at least 33% of the most extreme case, non-economic loss damages cannot exceed the applicable percentage of the maximum amount of damages available.[825] For injuries between 15% and 33%, a sliding scale contained in the CCA is used to determine damages for non-economic loss.[826] Damages under are not available for injuries considered less than 15% of the most extreme case.[827] The most extreme case

[821] Ibid.
[822] Sections 138 – 141.
[823] Sections 271(3); 271(5); 259(4) and 236(1).
[824] Section 87M *Competition and Consumer Act* 2010 (Cth).
[825] Section 87Q.
[826] Section 87R.
[827] Section 87S.

is simply defined as a case in which the claimant suffers non-economic loss of the 'gravest conceivable kind'.[828] No further guidance is provided for assessing injuries.

Exemplary and aggravated damages are not available in respect of death or personal injury claims under the CCA.[829]

There is no threshold limit or ceiling on a manufacturer's potential liability in relation to property damage under Part 3-5 of the ACL.

3.4.1.6 Concept of Defectiveness

For purposes of the action against a manufacturer for supplying a good with a 'safety defect' under section 138, the ACL now refers to a 'safety defect' as opposed to 'defect' under the former TPA. Section 9 of the ACL provides that goods have a safety defect *"if their safety is not such as persons generally are entitled to expect.*[830] In determining defectiveness, courts are still required to take into consideration "all relevant circumstances", including the same listed factors provided under the former section 75AC(2) of the TPA.[831] The provisions regarding inference of defectiveness under the former section 74AJ now appear in Sections 9(3) and (4) of the ACL, which mirrors the content of the former TPA provisions.

In determining the extent of the safety of goods under section 9, courts must consider all relevant circumstances, which include:

" ▪ the manner in which, and the purposes for which, they have been marketed;

[828] Section 87P.
[829] Section 87ZB.
[830] Section 9(1).
[831] Section 9(2).

- their packaging;
- the use of any mark in relation to them;
- any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them;
- what might reasonably be expected to be done with or in relation to them; and
- the time when they were supplied by their manufacturer."

Section 9 prohibits the drawing of an inference that goods have a safety defect only due to the fact that, after they were supplied by their manufacturer, safer goods of the same kind were put on the market.[832]

Further, an inference that goods have a defect is not to be made solely due to the fact that the goods complied with a Commonwealth mandatory standard and that standard was not the safest possible standard in light of the latest state of scientific or technical knowledge when their manufacturer supplied them.[833]

On the other hand, compliance with mandatory safety standards is only a factor in determining whether goods have a safety defect and is not conclusive per se. In the case of *Merck Sharpe & Dohme (Australia) Pty Ltd v Peterson*,[834] the Full Court of the Federal Court agreed with the findings of the trial court that compliance of a pharmaceutical product with the requirements of the *Therapeutic Goods Act* 1989 (Cth) was not sufficient to discharge the manufacturer's duty of care, as that Act did not evince an intention to revoke common law consumer rights.

[832] Section 9(3).
[833] Section 9(4).
[834] [2011] FCAFC 128.

It has been noted that other factors, while not specifically listed in the ACL or the former TPA, may have relevance to the defectiveness test. The Explanatory Memorandum, which introduced the former Part VA, notes that safety expectations may also depend on the "nature of the product and community knowledge of the product."[835]

Another relevant factor may be a class of goods that can be referred to as 'inherently dangerous goods'. This category includes tobacco, guns and knives. As such goods are by definition inherently dangerous, community expectations in relation to these goods must, therefore, include an understanding of the degree of risk involved with their use. Where the danger is well known to the general community, the community expects, and indeed must accept, a degree of risk.[836]

The price of goods may also be relevant. A consumer should not expect that a cheaper product contains any additional or special safety features which may be associated with a more expensive version of the product.[837]

The role of intermediaries may be relevant to defectiveness under the ACL. The Explanatory Memorandum to the former TPA gives the example of prescription pharmaceuticals supplied to the consumer by a qualified pharmacist and only on the prescription of a qualified medical practitioner.[838] Due to the complex nature and effects of medical and pharmaceutical products, comprehensive instructions and warnings may not be provided by the manufacturer to the consumer. However, detailed product information

[835] Parliament of the Commonwealth of Australia. 1991. *Explanatory Memorandum to the Trade Practices Amendment Bill (No 2)* 1991 at par 21. [Online] Available: http://www.austlii.edu.au/au/legis/cth/bill_em/tpab21991266/memo_0.html.*Explanatory Memorandum to the Trade Practices Amendment Bill (No 2) 1991*.
[836] Par 22.
[837] Par 23.
[838] Par 17.

is provided to doctors and pharmacists by the manufacturers so that these learned intermediaries can properly determine whether to dispense a product to a consumer. This approach was confirmed in *Carey-Hazell v Getz Bros and Co (Aust) Pty Ltd,*[839] which cited Australian authority[840] for the principle that the duty to warn rests with the treating physician in such cases, not the manufacturer or distributor. The Australian court noted that the "learned intermediary" doctrine has been subject to considerable judicial consideration in the US, but that it was not necessary to resort to this doctrine in this particular case as Australian law already holds that the duty to warn of the risks of medical products only accessible through a learned medical professional, rests with that medical professional, not the manufacturer or distributor. In other words, for these types of scenarios Australian law is consistent with the learned intermediary doctrine. Apart from these cases, Australian courts have to date declined to apply the "learned intermediary" doctrine in product liability cases.[841]

In *Australian Competition & Consumer Commission v Glendale Chemical Products,*[842] the only case brought under Part VA of the former TPA where liability was imposed, the court had to determine whether a caustic soda used to clean drains, was defective. After sprinkling the caustic soda into hot water, which the consumer had poured into a drain to dislodge a blockage, it reacted in such a way that it caused serious burns to the claimant's face and eyes. It was never suggested that the caustic soda itself had an inherent defect. Instead, the defectiveness issue in this case concerned the adequacy of the warnings and safety instructions accompanying the product, particularly whether the manufacturer

[839] [2004] FCA 853.
[840] *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000.
[841] Loveday & Morrison 'Product Liability 2016 - Australia' (2016) *International Comparative Legal Guides* at 5.2. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/australia#chaptercontent5.
[842] 40 I.P.R. 619 (1998) (Austl.Fed.Ct.)

should have included a warning for possible usage or contact with hot water. At trial, it was argued on behalf of the consumer, that:

> *"While consumers might generally be expected to know that caustic soda is corrosive and that contact with eyes and skin is potentially highly dangerous, all of which is stated explicitly on the label, ordinary consumers would not be expected to know of the dangers attendant upon the use of caustic soda with hot water in such a confined space. Accordingly, it was contended by the Commission that the goods….had a defect because the safety of such goods is not such as persons generally are entitled to expect. In particular, when regard is given to the absence of any instructions or warning concerning the use of the contents of the container with hot water, the goods are unsafe."*[843]

The trial court noted that the defectiveness standard adopted by section 7AC(1) *'is an objective one based upon what the public at large, rather than any particular individual, is entitled to expect*.' The judge acknowledged that it is not possible to foresee all possible uses of goods, and that section 75AC(1) does not require goods to be completely risk-free. According to him, the '*level of safety that is required of a product is what the community is entitled to expect*.' In light of the factors listed in section 75AC(2), a product may be defective even if it does not contain an inherent defect. The judge noted as follows:

> *"Thus, it is clear that a substance which is, for example, marketed as being suitable for a particular purpose without warnings as to the particular way in which that purpose should be achieved may have a defect because use in some ways would not be safe."*[844]

The court concluded that the manufacturer, who marketed the product for cleaning or removing grease from household drains, could have foreseen that a consumer might pour the caustic soda down a drain containing hot water. Considering, in addition, that the

[843] [627].
[844] [631].

characteristics of caustic soda, particularly its reaction with hot water, were well known, the manufacturer should have included a warning against using this product with hot water. On appeal, the Federal Court confirmed this decision, which was summarised by the trial judge as follows:

> *"Persons generally are entitled to expect to be warned of a danger or lack of safety in respect of a use to which goods might reasonably be expected to be put….While there is a warning that the contents of the container are corrosive and that contact with eyes and skin should be avoided, that is not adequate having regard to the nature of caustic soda and the purpose for which it was marketed."*[845]

In *Carey-Hazell v Getz Bros & Co,*[846] and action brought under section 75AD of the former TPA, the plaintiff developed thrombo-embolisms after a prosthetic mitral valve was implanted into her heart, resulting in the need for further surgery to replace the valve with a bio-prosthetic valve. She brought actions against the supplier of the valve in terms of section 75AD and against the cardiologist and the surgeon in negligence on the grounds of failure to warn of material risks associated with the operation.

With regard to the claim against the supplier of the prosthetic valve under the TPA, the plaintiff was required to prove the supply of the valve by a corporation in trade or commerce, that the valve had a defect and that she suffered injuries due to the defect.

The court confirmed that the defectiveness standard in section 75AC(1) is an objective standard based on what the public at large, rather than a particular individual, is entitled to expect. Goods are not required by this standard to be absolutely safe and risk-free. Therefore, the mere fact that the prosthetic valve carried a risk of post-operative complications and that the claimant unfortunately did suffer such a complication, does not

[845] [632].
[846] (2004) FCA 853.

of itself justify a general conclusion that the valve is defective. Furthermore, the risks attendant in use of the valve was well known to medical practitioners, and the plaintiff had been advised of the risks prior to the operation. Therefore, the plaintiff could not reasonably have expected that there would be no risk of complications developing after implantation of the valve. The court rejected an argument that the supplier had a duty to warn the plaintiff of the risks, since it had been accepted under Australian law that the duty to warn patients rests with the treating medical practitioner, not the manufacturer or distributor of the medical product.[847]

The recent decision of the Australian High Court in *Robinson Helicopter Company Incorporated v McDermott*[848] considered the adequacy of instructions provided by a helicopter manufacturer in a maintenance manual and the extent to which manufacturers can rely on the expertise of qualified maintenance persons in interpreting the instructions. The case was brought against a helicopter manufacturer in negligence and pursuant to section 75AD of the former *Trade Practices Act*[849] arising from a helicopter crash in 2004 resulting in the death of the pilot and serious injuries to the plaintiff.

It was accepted by the parties that the crash was caused by the failure of the helicopter's forward flex plate due to one of the 4 bolts securing the flex plate being incorrectly assembled and not tightened properly (‘the defect'), contrary to instructions contained in the helicopter's maintenance manual. The flex plate had been removed and reassembled some two months prior to the crash. After reassembly of the flex plate, but before the

[847] *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000.
[848] [2016] HCA 22 (8 June 2016).
[849] 1974 (Cth).

crash, the flex plate had also been subject to two ‘100 hourly' inspections by licenced aircraft maintenance engineers (‘LAME')[850] and several routine pre-flight checks by pilots.

It was accepted by the parties that the manufacturer did not cause the defect and it was unknown who did. However, the focus in these proceedings was not when and how the defect arose, but rather the adequacy of the inspection procedure contained in the manual for detecting the defect. The manual instructed LAMEs to ‘verify the security’ of the flex plate during 100 hourly inspections. The manual further required that the bolts be tightened to a specific setting and that a stripe of torque seal paint be applied to the bolts after installation, allowing for any subsequent bolt rotation to be detected visually.

At first instance, the trial judge inferred five alternative factual possibilities as to the presence (or absence) and condition of the torque stripe at the time the LAMEs conducted their inspections. The trial judge dismissed the plaintiff’s claim, holding that the manual’s instructions were sufficient to convey to a competent LAME that it was necessary to look for a torque stripe on each bolt and if the stripe was missing, damaged or incomplete, to take steps to determine whether the bolt was correctly tightened, to re-tighten the bolt and then apply a fresh torque stripe.[851]

The majority of the Court of Appeal held that the trial judge erred in his findings of fact and found that there was only one possibility: the torque stripe was in a condition that would not have alerted the LAMEs to investigate the bolt further. The Court of Appeal held that the manual was defective in failing to warn LAMEs that visual inspection of torque stripes

[850] The *Civil Aviation Regulations* 1988 (Cth) prescribed the classes of person allowed to carry out maintenance work on helicopters, one such class being licensed aircraft maintenance engineers (‘LAME’). The Regulations required that maintenance work on a helicopter by a LAME be performed in accordance with instructions provided in the helicopter manual.

[851] *McDermott v Robinson Helicopter Company Incorporated* [2014] QSC 34 at [159].

may not be a sufficient indicator of bolt security due to fading or incorrect application and should have recommended physical testing of the bolts.[852]

The High Court unanimously allowed the appeal, holding that the Court of Appeal had erred in interpreting the evidence and overturning the trial judge's findings of fact without demonstrating they were 'glaringly improbable' or 'contrary to compelling inference'.[853] Further, the High Court found that the trial judge was correct in finding that the plaintiff had not shown the Manual was defective or insufficient to discharge the manufacturer's duty of care.[854] It was probable that, if the LAMEs had properly inspected the bolt in accordance with the manual, they would have noticed the absence of a torque stripe or a torque stripe in such a condition that would have alerted them to examine the bolt further.[855]

While it was strictly unnecessary to address causation, the High Court briefly commented that the Court of Appeal had also erred in this regard. Of all the factual possibilities inferred, the Court of Appeal had held that one possibility was not covered by the manual.[856] However, it was not shown that this possibility was any more likely than the others.[857] Therefore, a breach of duty in failing to provide for this one possibility in the manual could not be considered causative of the crash.[858] Further, the witness evidence pointed against the likelihood that the LAMEs would have been any more diligent in adhering to a recommendation in the manual that they physically check the bolts than they were in visually examining the torque stripes for possible bolt rotation.[859]

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[852] *McDermott v Robinson Helicopter Company Incorporated* [2014] QCA 357 at [22].
[853] At [43].
[854] At [78].
[855] Ibid.
[856] Namely, the torque stripe was incorrectly applied so as not to adhere to both the bolt and the fixed components, such that the stripe could move with the bolt and not crack.
[857] [81] - [82].
[858] Ibid.
[859] At [87].

While the High Court ultimately found in favour of the manufacturer, this protracted litigation serves as a powerful reminder to manufacturers to ensure that maintenance instructions accompanying products are clear and comprehensive, having regard to the reasonably foreseeable reader, whether it be a lay consumer or qualified maintenance person. It further highlights that maintenance instructions accompanying products, particularly relating to safety indicators, should alert the reader to the risk of those indicators failing or being inconclusive. Manufacturers should avoid, as far as reasonably practicable, relying on the expertise of qualified maintenance persons to consider further inspections above and beyond what is expressly recommended by the manufacturer. Ultimately, the manufacturer is best placed to advise on all features of its product.

With respect to actions for damages against ‘manufacturers ‘ and ‘suppliers’ for breach of implied consumer guarantees under section 271 and 259 respectively, the ACL implies various consumer guarantees into agreements for the supply of goods to consumers in trade or commerce. These guarantees effectively impose a statutory duty on manufacturers and suppliers to supply goods that comply with these guarantees, where applicable.

Section 54 implies a guarantee as to ‘acceptable quality’ into a supply of goods to a consumer in trade or commerce.[860] Goods are of acceptable quality under the ACL if they are "as fit for all purposes for which goods of that kind are commonly supplied; acceptable in appearance and finish; free from defects; safe; and durable as a reasonable consumer

[860] Section 54(1)(a).

fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable," taking into account the following:[861]

- the nature of the goods;
- the price of the goods (if relevant);
- any statements about the goods on packaging or labelling on the goods;
- any representation made about the goods by the supplier or manufacturer of the goods;
- any other relevant circumstances with respect to the supply of the goods.

Goods do not fail to be of acceptable quality if the consumer's conduct causes them to become of unacceptable quality or if the consumer fails to take reasonable steps to prevent the goods from becoming of unacceptable quality, and they are damaged by abnormal use.[862] Goods supplied by way of sale by auction are excluded from section 54.[863]

Section 55 implies a guarantee into a supply of goods to a consumer in trade or commerce that goods are reasonably fit for any disclosed purpose and any purpose for which the supplier represents that they are reasonably fit.[864] Section 57 provides that, if goods are supplied by reference to a sample or demonstration model, there is a guarantee that the goods match that sample or model in quality, state or condition and that the goods are free from defects that would not be obvious on reasonable examination of the sample or model and would cause the goods not to be of acceptable quality. If goods are supplied by

[861] Section 54(3). If goods are not of acceptable quality, and the only reason(s) for it were drawn to the consumer's attention before the supply, then the goods are taken to be of acceptable quality (s.54(4)).

[862] Section 54(6). See, for instance, *Jillawarra Grazing Co v John Shearer Ltd* [1984] ATPR 40-441; ASC 55 - 307, a case where agricultural equipment was found not to be defective as it failed to work because the person operating it did not operate it correctly.

[863] Section 54(1)(b).

[864] Section 55(1)(a). A disclosed purpose is defined under s 55(2) as a particular purpose for which the consumer acquires the goods and that the consumer made known, expressly or by implication, to the supplier or manufacturer or an agent of the supplier/manufacturer. This guarantee does not apply if it can be shown that the consumer did not rely on, or that it was unreasonable to rely on, the skill or judgment of the supplier or the manufacturer.

description and by reference to a sample or demonstration model, the guarantees in sections 56 and 57 both apply.[865] The guarantees under sections 55, 56 and 57 do not apply to goods supplied by way of auction sales.

In certain circumstances, a failure of goods to comply with the consumer guarantees implied by the ACL will amount to a 'major failure' if:

- A reasonable consumer, fully aware the nature and extent of the failure, would not have acquired the goods; or
- the goods deviate in one or more significant respects from a description, sample or demonstration model; or
- the goods are "substantially unfit for a purpose for which goods of the same kind are commonly supplied", and cannot be remedied easily and within a reasonable time; or
- the goods are unfit for a disclosed purpose which was made known to the supplier, and the goods cannot be remedied easily and within a reasonable time to make them fit for such a purpose; or
- the goods are not of 'acceptable quality' as they are 'unsafe.'[866]

The ACL prohibits contracting out of these consumer guarantees. A term of a contract is void to the extent that it purports to exclude, restrict or modify the guarantees or liability of a person for a failure to comply with a guarantee.[867] However, section 64A of the ACL permits suppliers to limit their liability for failures to comply with these consumer guarantees to one of the following:

- replacing the goods or supplying equivalent goods;

[865] Section 56(3).
[866] Section 260.
[867] Section 64.

- repairing the goods
- paying the cost of replacing the goods or acquiring equivalent goods;
- paying the cost of having the goods repaired.

It is not clear what the relationship is between the concepts of 'acceptable quality' and 'unsafe' in the context of consumer guarantees and 'safety defect' in the context of manufacturer's liability under section 138. This has not been clarified in any reported judgements. However, it is arguable that the test for a 'safety defect' as set out in section 9 of the ACL would be informative in determining whether a product is 'unsafe' and therefore not of 'acceptable quality' for purposes of the relevant consumer guarantee under section 54. From a purely textual interpretation of these words, a product with a 'safety defect' would arguably also be 'unsafe' and not of 'acceptable quality'.

The guarantee as to 'acceptable quality' abandons the words 'merchantable quality' used in the equivalent provision under the former TPA.[868] It has been held under the former TPA provision that statistical data on the failure rate of goods of the type in question does not amount to any evidence of the quality of those goods.[869] Further, the relevant point in time for assessing whether goods are of acceptable quality is the time when the goods are supplied to the consumer.[870]However, this does not mean that information about the goods which were not known at the time of supply is irrelevant. The assessment of what was objectively reasonable for the consumer to expect of the product's quality is to be made taking into account all relevant information available at the time of the trial.[871]

[868] Section 74D(3) TPA.
[869] *Medtel Pty Ltd v Courtney* [2003] FCAFC 151.
[870] Ibid; see also *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC1 128.
[871] *Medtel Pty Ltd v Courtney* [2003] FCAFC 151.

In *Medtel Pty Ltd v Courtney*,[872] an action was brought against the Australian importer of heart pacemakers when it became apparent that a batch of the pacemakers, which included the plaintiff's pacemaker, failed due to a soldering problem. The court found that the plaintiff's pacemaker was not of merchantable quality under the former TPA provision, even though his pacemaker had not in fact failed.

In the author's practical experience, there is often an overlap in pleadings between these concepts of "safety defect" for purposes of a section 138 claim against a manufacturer and the concept of 'acceptable quality' under section 54 and related actions for damages. For instance, the author has been involved in claims brought against suppliers of defective products who were also deemed manufacturers of the products (as they imported the products to Australia, assembled the products or added their own mark or brand to them). The claims are often based on breach of the implied consumer guarantee as to acceptable quality, and alternatively, the section 138 claim against manufacturers for supplying a product with a safety defect. In pleading the claim under section 138, plaintiffs' solicitors often particularise the allegation of 'safety defect' by pleading that the product breached the implied consumer guarantees under the ACL. This practice is discussed in further detail in the case study below at 4.5.3

3.4.1.7 Defences / Restriction of Liability of the Supply Chain

3.4.1.7(i) Compliance with public regulation

With respect to a claim against a manufacturer for supplying a good with a 'safety defect', the ACL provides a defence if the manufacturer establishes that the goods had a safety defect solely due to compliance with a Commonwealth mandatory standard for them.[873]

[872] [2003] FCAFC 151.
[873] Section 142(b).

A standard which sets out only minimum performance requirements is not a mandatory standard for purposes of Part 3-5. The former TPA's Explanatory Memorandum explains that where a manufacturer is free to exceed the minimum requirements of the standard without sanction, then it cannot be said that the standard is the sole cause of the defect.[874] Similarly, where the manufacturer is free to choose how to achieve the performance level required by the standard and chooses a 'defective' method, this defence will not be available to the manufacturer.[875] If a manufacturer establishes this defence, the Commonwealth will be liable to compensate the plaintiff.[876]

3.4.1.7(ii) Absence of defect at time of supply

Pursuant to section 142, it is a defence to a section 138 claim if the manufacturer establishes that the safety defect in the goods did not exist at the time when they were supplied by their actual manufacturer. In the case of electricity, the safety defect must not have existed at the time at which the electricity was generated, in other words, before it was transmitted or distributed.

The wide definition of 'goods' under section 2(1) of the ACL includes component parts which are later integrated into finished goods. Manufacturers of components incorporated into finished goods will be liable to compensate injured plaintiffs if the component goods contributed to, or caused the defect in the finished goods.

Section 142(d) provides a defence where the manufacturer establishes that, if the goods that had that safety defect were comprised in other goods, that safety defect is attributable

[874] Par 53.
[875] Ibid.
[876] Section 148.

only to the design of the other goods, the marking accompanying the other goods, or the instructions or warnings provided by the manufacturer of the other goods.

The equivalent defence under the former TPA referred to 'finished goods' as opposed to 'other goods' under the ACL. The wording of the TPA defence seemed to suggest that component manufacturers are provided with a defence where the finished goods were defective because of an act of the manufacturer of the finished goods. This appears to cover scenarios where the manufacturer of the finished product overloaded or misused a component which another manufacturer supplied to specification. It is arguable that the ACL's use of the words 'other goods' means that this defence could possibly work in the reverse by holding the manufacturer of a defective component liable where the defect is solely attributable to the design, markings, instructions or warnings relating to that component.

3.4.1.7(iii) Defect not reasonably discoverable

Pursuant to section 142, it is a defence if the manufacturer establishes that the "*state of scientific or technical knowledge"* at the time when the manufacturer supplied the goods, did to enable that safety defect to be discovered.

The equivalent of this defence under Part VA of the former TPA was successfully raised in *Graham Barclay Oysters Pty Ltd v Ryan; Ryan v Great Lakes Council; State of New South Wales v Ryan.*[877] This case involved a claim by a group of consumers who contracted the Hepatitis A virus after consuming oysters contaminated with the virus. Investigation revealed that the lake where the oysters were grown had been polluted with human faecal material flowing from the adjacent land after heavy rainfall. The plaintiffs sued the oyster

[877] 2002 HCA 54; 211 CLR 540.

farmers in negligence and under various provisions of the former *Trade Practices Act* including Part VA.

The High Court held that the oyster farmers did not breach their duty of care to consumers. The Court confirmed its previous decision in *Wyong Shire Council v Shirt*[878] that a duty of care does not extend to ensuring the safety of consumers in *all circumstances*. The duty of care will be discharged by doing what a 'reasonable man' would do after assessing the magnitude of the risk, the probability of its occurrence, and the expense and difficulty of alleviating the risk.[879] The court held that, on all the facts, the oyster farmers acted reasonably and did not breach their duty of care. The oyster farmers had waited long enough after the rainfall before resuming harvesting and made sure the water's salinity levels had normalised. It was also shown that the farmers had been using the best test commercially available for detecting bacteria.

The Court held that the public is entitled to expect that oysters supplied for consumption are virus free and therefore the contaminated oysters were ‘defective goods' within the meaning of Part VA. However, the state of science at the time provided no means to test for Hepatitis A contamination in oysters without destroying the oysters. As the defect was not capable of being discovered before supply, the oyster farmers succeeded with the ‘state of art' defence. The oyster farmers were, however, liable in negligence and breach of consumer guarantee provisions under Part V Division 2A of the TPA in that the oysters were not of merchantable quality and not reasonably fit for the purpose for which they were supplied.

878 (1980) 146 CLR 40.
879 [190].

In the decision of the Full Federal Court in *Merck Sharpe & Dohme (Australia) Pty Ltd v Peterson*,[880] which related to the pharmaceutical drug Vioxx, the manufacturer's state of the art defence was upheld. The court found that the objective state of scientific knowledge at the time of supply did not allow the manufacturer to discover the defect. The manufacturer was only able to discover that consumer Vioxx increased the risk of heart attacks when it obtained the results of a study in September 2004, at which time Vioxx was withdrawn from the market.

3.4.1.7(iv) Apportionment of liability

Where the loss was caused by both a defect in the goods and an act or omission of the person who suffered injury or loss because of the defective goods, the ACL provides that a court may reduce the amount of compensation by an appropriate amount, taking all relevant circumstances into account.[881] The acts or omissions include the acts or omissions of another individual for whom the person is responsible. In appropriate circumstances, the reduction can amount to a complete disallowance of the claim. This provision has a similar effect to the defences of contributory negligence and voluntary assumption of risk in a claim brought in negligence.

A manufacturer is liable to indemnify a supplier, who supplied the goods to a consumer, if the supplier is liable for damages under section 259(4) for loss or damage suffered by the consumer and the manufacturer is or would be liable (under section 271) for damages to the consumer for the same loss or damage.[882] The supplier may bring an action against

[880] [2011] FCAFC 128.
[881] Section 137A(1).
[882] Section 274(1).

the manufacturer for such legal or equitable relief as the supplier could have obtained if that liability had arisen under a contract of indemnity made between them.[883]

If the goods in question are not *"of a kind* ordinarily acquired for personal, domestic or household use or consumption," then the manufacturer's liability to the supplier is limited to the cost of replacing or repairing the goods, or of obtaining equivalent goods, whichever is the lowest amount.[884] This limitation does not apply if the supplier establishes that it is not fair or reasonable for the liability of the manufacturer to be limited in this way.[885]

Where goods did not comply with a safety or information standard, a supplier may be able to invoke a defence under section 252 if it can show it merely acquired the goods from a person carrying on business in Australia for the purpose of re-supply and, either:

- the supplier did not know, and could not with reasonable diligence have ascertained, that the goods were non-compliant with that safety standard, or that the supplier had not complied with that information standard, or
- the supplier relied in good faith on a representation by the person from whom the supplier obtained the goods that there was no safety or information standard for such goods.[886]

[883] Section 274(3).
[884] Section 276A.
[885] Section 276A(2). In determining whether or not it is fair or reasonable for the manufacturer's liability to a supplier to be limited, a court is to take into account all the circumstances of the case, and in particular: "the availability of suitable alternative sources of supply of the goods; (b) the availability of equivalent goods; (c) whether the goods were manufactured, processed or adapted to the special order of the supplier" (Section 276A(3)).
[886] A supplier is not entitled to rely on this defence unless a court gives leave or the supplier has, no later than seven days before the day on which the hearing commences, served on the plaintiff a written notice identifying the person from whom the supplier acquired the consumer goods.

3.4.1.7(v) Prescription

Defective goods actions brought under Part 3-5 of the ACL are generally required to be brought within 3 years after the claimant becomes aware, or ought reasonably to have become aware, of the particular circumstances that give rise to the cause of action.[887] The ACL imposes a 10 year repose period, which provides that an action under this part cannot be brought more than 10 years after the supply of the goods by the manufacturer.[888]

An action for non-compliance of a product with an implied statutory consumer guarantee under Part 5-4 of the ACL must generally be commenced within 3 years after the claimant becomes aware, or ought reasonably to have become aware, that the consumer guarantee was not complied with.[889]

In relation to personal injury claims in general under the CCA, including actions relating to Part 3-5 or Division 2 of Part 5-4 of the ACL, section 87F of the CCA defines the applicable limitation period as either the "date of discoverability"[890] or the "long-stop period" being a period of 12 years from the date of the alleged act or omission,[891] whichever is later.

3.4.1.7(vi) Contractual restriction of liability

Section 64A of the ACL provides that any consumer guarantees implied by the ACL and any rights and remedies afforded by the ACL cannot be excluded by way of a contractual

[887] Loveday & Morrison 'Product Liability 2016 - Australia' (2016) *International Comparative Legal Guides* at 5.2. Available [online]: https://www.iclg.co.uk/practice-areas/product-liability/product-liability-2016/australia#chaptercontent5.
[888] Section 143(2).
[889] Ibid.
[890] The date of discoverability for death of injury is the first date when the plaintiff in the proceeding knows or ought to know the following: that death or personal injury has occurred and was attributable to a contravention of the Act, and that, in the case of personal injury, the injury was significant enough to justify bringing an action.
[891] As defined in section 87H.

restriction or exemption clause. The ACL provides that a person may be subject to prosecution under the Act for attempting to do so. Section 25 of the Australian *Competition and Consumer Act* 2010 simply lists examples of terms that may be unfair, for instance, a term that limits or has the effect of limiting, one party's right to sue another party.[892]

In practice, manufacturers and suppliers in Australia would often include a clause in their contracts of sale whereby they exclude all implied warranties and liability, in so far as it is permitted by the ACL and other fair trade legislation. Such a clause may have the effect of excluding common law warranties and liability[893] however, the manufacturer or supplier would still be bound to comply with the ACL and may therefore still be liable under the ACL for supplying defective goods.

3.5 COMPARISON OF FOREIGN REGIMES

3.5.1 Parties liable

- The US *Restatement (Third)* [894] imposes liability upon any person in the supply chain "*who is engaged in the business of selling or otherwise distributing products."* This would therefore include manufacturers and commercial sellers/retailers, distributors/wholesalers and importers of defective goods into the US.

- The EU Directive[895] imposes liability on producers and importers of products into the EU. In circumstances where the producer cannot be identified, each supplier of the product is deemed to be its producer, unless the supplier informs the injured person, within a reasonable time, of the identity of the producer or the person who supplied the

[892] Section 25(k).
[893] Provided the term has been properly included in the contract and is not contrary to law. A discussion of the validity of contractual exclusion or exemption clauses in Australia is beyond the scope of this study.
[894] 3.2.1.1.
[895] 3.3.1.1.

product to that supplier. The same rule applies in the case of an imported product, if the imported product does not show the identity of the importer, even if the name of the producer is shown. A similar scope of parties liable under the EU Directive is achieved by the relevant transposing provisions in the UKCPA[896] and GPLA.[897]

- The ACL[898] imposes liability on "manufacturers" for supplying goods with a "safety defect" or goods that breach implied consumer guarantees under the ACL. The ACL also imposes liability on "suppliers" of products that breach implied consumer guarantees in relation to acceptable quality (which includes the requirement of 'safe'), which may give rise to a claim for damages. The ACL provides an extended definition of manufacturer which may include parties who assemble products, apply their own name, brand or mark to the product and in certain instances, importers of products.

- There is general consensus among these jurisdictions that liability for harm caused by defective products should not be restricted to the actual manufacturer, but to other parties in the supply chain who play a part in putting into circulation harmful products.

3.5.2 Potential claimants

- The *Restatement (Third)*[899] simply refers to harm to "persons or property" and "the plaintiff." Any person, whether a consumer, user or bystander, who suffers harm due to a defective product is arguably entitled to bring a claim against the commercial seller or distributor of defective product. The *Restatement (Third)* defines "harm to persons or property" in the context of recovery of economic loss to include any economic loss

[896] 3.3.1.8(i).
[897] 3.1.1.8(ii).
[898] 3.4.1.1.
[899] 3.2.1.2.

caused by "*harm to the plaintiff's person"* or *"the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law."* In other words, plaintiffs may also be dependants of a person who is harmed by a defective product.

- The EU Directive[900] refers in numerous recitals to the "protection of the consumer." However, the provisions of the EU Directive refer to "the injured person". Accordingly, the remedy afforded by the EU Directive appears to be available to any person harmed by a defective product, whether that person is the purchaser of the product, a bystander or a defendant who suffers loss as a result of harm caused by a defective product to another person. In transposing the EU Directive, the UKCPA[901] refers to "the person who suffered the damage" whereas the GPLA[902] refers to "the injured person". This wording is broad enough to entitle any person who has suffered damage as a result of a defective product, whether a consumer who purchased the product, a bystander or dependants of "the person who suffered the damage" or "the injured person," to recover damages under the UKCPA.

- The ACL[903] sets different requirements for qualification as a claimant depending on the basis for the action. For purposes of an action against the "manufacturer" supplying a good with a "safety defect" under section 138, the ACL provides that an "injured individual" or "a person other than an injured individual" may bring a claim. With respect to an action against a manufacturer for supplying a good that does not comply with the implied consumer guarantees, the ACL provides that "an affected person in relation to the goods" may bring an action. This wording is broad enough to include a claim by a dependant of a breadwinner who is injured by the defective good, product users who did

[900] 3.3.1.2.
[901] 3.3.1.8(i).
[902] 3.3.1.8(ii).
[903] 3.4.1.2.

not purchase the product and bystanders who are harmed by the use of the good by another person. For purposes of an action against "suppliers" under section 259 for supplying, in trade or commerce, a good that breaches the implied consumer guarantees, the ACL provides that a "consumer" may bring an action. The ACL sets specific requirements to qualify as a "consumer" and generally requires that the consumer received the goods through a "supply" in "trade or commerce."

- There appears to be general consensus among these foreign strict product liability regimes that not only consumers in a contractual sense are protected, but also other product users, bystanders and dependants of persons harmed by defective goods.

3.5.3 Goods

- The definitions of "goods" or "product" vary among the foreign regimes in respect of their formulation and specific inclusions.

- The US Restatement (Third)[904] contains a definition of "product" which is essentially restricted to tangible goods, namely "tangible personal property." However, the definition recognises that other items, such as real property and electricity, would qualify as "products" where *"the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement."* The majority of American courts have held that, once electricity has been distributed to the consumer through the meter, it is subject to strict product liability. A number of courts have held that high-voltage electricity in a distribution line is not subject to product liability as the high-voltage electricity has not yet been converted to a form for delivery to a consumer. The majority of courts do not consider information to be a "product," frequently citing the concern that imposition of

[904] 3.2.1.3.

strict liability for false or defective information would encroach considerably on free speech. The definition of "product" does not refer to component products, however, the Restatement (Third) provides specifically for liability of commercial sellers or distributors of defective product components for harm caused by another product into which that defective component was integrated. While the definition of "product" is silent on whether second-hand goods are included, any second-hand tangible good that is "*distributed commercially for use or consumption*" would arguably qualify as a "product". The definition of "product" expressly excludes all human blood and human tissue, even when provided commercially.

- The EU Directive [905] defines "product" to mean all movables, even if they are incorporated into another movable or into an immovable. The definition of 'product' expressly includes electricity. The reference to movables being "incorporated into another movable" would include component products that are later fitted, assembled into or incorporated into another product. The EU Directive is silent on whether second-hand goods are covered, however, the words "all movables" are arguably broad enough to include second-hand goods.

- The corresponding provisions in the UKCPA[906] transposing the EU Directive is similar to the EU Directive's definition of 'product' in essence but provides further detail as to specific "goods" that are included, being *"substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle."* The UKCPA covers information in the tangible form of a book, but not information in general.

[905] 3.3.1.3.
[906] 3.3.1.8(i).

With respect to digital information the position is not so clear, particularly where it is difficult to draw a line between the software and hardware of a product.

- The corresponding provisions in the GPLA[907] transposing the EU Directive basically mirror the EU Directive's definition of "product" with no further specific inclusions.

- The ACL[908] defines "goods" broadly by providing a non-exhaustive list of items that would qualify as "goods" being "*ships, aircraft and other vehicles; animals, including fish; minerals, trees and crops, whether on, under or attached to land or not; gas and electricity; computer software; second-hand goods; any component part of, or accessory to, goods.*" The ACL provides that goods are taken to be supplied to a consumer even if they have become affixed to land or premises at the time of supply. The Australian Federal Court has held that the inclusion of 'electricity' in the definition of "goods" under the former TPA does not mean that "goods" include encoded electrical signals such as electronically disseminated financial information sent from a retail supplier of stock exchange information to its subscribers' computers, as the ordinary meaning of "goods" cannot be extended by interpretation to include encoded electrical signals. It is unclear whether Australian courts would hold that information in itself, as opposed to the product into which it is incorporated, such as software, would qualify as "goods". The Federal Court has also held, in relation to the supply of human blood in the course of a blood transfusion by a hospital during an operation, that the supply was not a supply of "goods", rather a supply of "services" under the former TPA. However, the case in question turned on the particular facts and is not authority for a general proposition that the supply of blood will never constitute a supply of "goods".

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[907] 3.3.1.8(ii).
[908] 3.4.1.3.

- There appears to be general consensus among these jurisdictions that component goods are subject to strict product liability. There is also generally consensus that electricity is subject to strict product liability, albeit with certain restrictions in some American states. The EU Directive and the majority of US courts do not consider information, as opposed to the tangible product into which it is incorporated, to be a product in its own right. The ACL is silent on this issue and it has not been judicially tested in Australia. Second-hand goods are expressly included in the ACL, whereas the EU Directive and US Restatement are silent on this issue but are worded broadly enough to include such goods.

3.5.4 Causation

- The US Restatement (Third)[909] provides that causation is to be determined by the prevailing rules and principles governing causation in tort. In other words, states apply the principles of causation as they have been developed in those jurisdictions. Causation in US tort law generally involves two enquiries, namely the factual cause of the injury and the legal/proximate cause of the injury (based on policy considerations), both of which are determined by a jury. Plaintiffs have had difficulty establishing factual causation, either due to the nature of the accident, the defect or the product.

- In terms of factual causation, some US courts have recognised a so-called “material contribution to risk” rule in the context of asbestos-related cancer claims and a single wrongdoer. Under this rule, plaintiffs need only show that exposure to the defendant’s asbestos products was, in reasonable medical probability, a substantial factor in contributing to the risk of developing cancer.

[909] 3.2.1.4.

- Section 3 of *the Restatement (Third)* fulfils a function analogous to the *res ipsa loquitur* doctrine by allowing an inference of defect to be drawn when justified by the facts of the harm-causing incident. Although occasionally applied in cases involving a design defect, the majority of cases brought under this section involve alleged manufacturing defects. This rule is restricted to cases where the product to failed to perform its manifestly intended function, thereby supporting the conclusion that a defect is the most likely explanation for the harm caused, sometimes referred to as the "malfunction theory" or "malfunction doctrine". Since the plaintiff is not required to prove the specific nature of the defect that resulted in the malfunction, defectiveness can be established without meeting the requirements for a defect under the Restatement (Third).

- Some US courts recognise that there may be products or categories of products that pose inherently unreasonable risks for which strict liability should attach, regardless of the exact nature of the defect. Such products are considered defective and unreasonably dangerous without having to weigh and balance the factors normally involved in determining defectiveness.

- The EU Directive[910] provides no guidance as to the test for causation and leaves it up to member states to apply, for instance, the general principles of causation used in negligence claims developed in their respective jurisdictions. However, it is questioned by English authors whether the general principles of causation applicable in tort law ought not be adapted to provide for a partial reversal of the burden of proof, given the consumer protection policy underlying the EU Directive. Dutch courts have found that, although article 4 of the EU Directive places the burden of proving defectiveness on the claimant, this burden is too heavy. Therefore, Dutch courts instead opted for a midway:

[910] 3.3.1.4.

If the claimant can show that he or she had used a product in a normal way and it failed, it is factually presumed that a defect in the product caused the damage. The burden would then shift to the producer to prove the product was not defective.

- The difficulties arising from the EU Directive's lack of guidance as to causation is illustrated by a series of recent UK judgments applying the UKCPA where differing views were expressed on the level of specificity required of a plaintiff with respect to proving defectiveness and causation. The position appears to have been settled recently, at least in the UK, to the effect that a plaintiff is not required to "specify or identify with accuracy or precision the defect in the product. It is sufficient to prove the existence of a defect in broad or general terms," for instance "a defect in the electrics of the Lexus (motor car)." If this position is to be followed by English courts in the future without qualification, it would arguably assist claimants substantially in establishing defectiveness as well as causation for purposes of a UKCPA claim.

- In some instances, UK courts have recognised exceptions to the traditional 'but for' test for factual causation, known as the 'material contribution to harm' and the 'material contribution to risk' tests.[911] The material contribution to harm exception has its origins in nineteenth century nuisance cases in Scotland involving pollution of rivers and waterways by multiple factory owners. Subsequently, the 'material contribution to harm' test has been recognised, for example, in the context of a worker developing pneumoconiosis following tortious and non-tortious exposure to silica dust at an industrial plant. The 'material contribution to risk' of harm test has been recognised in the context of a worker who developed dermatitis at the defendant's brick kiln due to exposure to brick dust on the basis that the defendant's failure to provide washing

[911] 3.3.1.8(i) under discussion of 'Causation'.

facilities materially increased the risk of developing dermatitis.

- In cases involving a single wrongdoer where the facts point to more than one probable cause of harm, the UK Supreme Court has also applied the 'material contribution test' as an alternative to the traditional 'but-for' test. In *Sienkiewicz v Greif (UK) Ltd; Knowsley MBC v Willmore*[912] the plaintiffs had died of mesothelioma due to exposure to asbestos dust. The plaintiffs had been subject to low-level atmospheric exposure to asbestos as well as light exposure over a prolonged period at their respective places of employment. The court held that the contribution to risk of mesothelioma by the places of employment was sufficiently material to constitute factual causation against the employers. The reason for this exception is that medical science is currently not able to ascertain which asbestos fibre or fibres caused the mesothelioma, which usually only occurs many years after exposure. The *Sienkiewicz* exception has been developed in the context of asbestos-related mesothelioma cases where the plaintiff was subject to a tortious exposure to asbestos and other non-tortious, atmospheric/environmental exposures to asbestos. In *Fairchild v Glenhaven Funeral Services Ltd,*[913] the material contribution to risk test was also applied in the context of mesothelioma and multiple tortious exposures to asbestos caused by more than one wrongdoer.

- More recently, English courts have applied the material contribution to harm test in the context of medical negligence or malpractice, where a person suffers from a harmful process arising from a natural cause, but exposure to the harm is prolonged due to medical malpractice.

[912] [2011] UKSC 10.
[913] [2002] UKHL 22.

- Aside from the cases dicussed above where a material contribution to harm or material contribution to risk of harm test has been applied in the context of causation, the traditional 'but for' test remains the applicable test for factual causation in the UK. It appears that the material contribution to harm or risk of harm test for causation has not yet been applied in any reported product liability case law in the UK. However, given the numerous instances where these exceptions have been recognised in other contexts, it may only be a matter of time before it is extended, in appropriate cases, to product liability claims brought under the UKCPA or in negligence.

- German courts apply their national rules regarding causation in relation to claims under the GPLA,[914] generally comprising a two-fold approach, similar to English law, involving firstly a factual causation enquiry and secondly, a normative question of legal cause. In some cases, the plaintiff is not required to prove the exact nature of the product defect which caused harm. If a product malfunctions in "circumstances where one is entitled to expect that it does not fail, this makes out a *prima facie* case of defect. The burden then shifts to the defendant who has to identify whether the malfunction is due to a manufacturing defect or design defect. If the product deviated from its intended design, indicating manufacturing error, the defendant would be strictly liable. If, however, the product malfunction is due to a design feature which the defendant can identify, the burden shifts back to the claimant who will have to show the possibility of a safer, alternative design.

[914] 3.3.1.8(ii).

- The ACL[915] does not provide any specific guidance as to the test for causation to be applied. It is accepted that the general principles of causation as applied under Australian tort law, apply in the case of strict product liability claims under the ACL. While the causation analysis may require the drawing of inferences, particularly where it is difficult to identify the cause of damage from multiple possible causes, establishing causation requires proof, on a balance of probabilities, that a breach of duty in negligence (or a product defect) was the cause of the damage.

- None of the strict product liability instruments considered in this chapter prescribes any specific test for causation. Courts in all these jurisdictions have resorted to applying general principles of causation prevailing in their respective jurisdictions, generally involving a factual enquiry and a more normative, legal causation question. The courts have developed specific adaptations or exceptions to the traditional factual causation tests to assist plaintiffs in cases where the facts make it impossible to establish factual causation on a balance of probabilities.

3.5.5 Harm and damages

- The US Restatement (Third)[916] imposes liability for 'harm to persons or property' and economic loss resulting from such harm, except for loss resulting from damage to the defective product itself. Some jurisdictions allow for the recovery of punitive damages in product liability cases. The state laws governing punitive damages and the recovery limits vary from state to state.

- The EU Directive enables recovery of damages for harm caused by death, personal injuries and property damage, with the exception of damage to the defective product

[915] 3.4.1.4.
[916] 3.2.1.5.

itself. The EU Directive is without prejudice to national laws regarding 'non-material damage'. In other words, the member states' respective laws regarding economic loss damages are not affected by the EU Directive. The EU Directive leaves it to member states to decide on the recovery of pure economic loss. The EU Directive imposes a threshold amount of EUR 500, meaning that the first EUR 500 of any claim is not recoverable.

- The CJEU has recently adopted a broad interpretation of the meaning of 'damage' under the EU Directive.[917] It held that the EU Directive requires a plaintiff to prove a causal relationship between the defect and the damage suffered and allows for recovery of damages that are necessary "to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect". In the case of a defective implanted medical device, the EU Directive covers damages for the cost of replacement of the defective product and the costs of the surgery. The broad interpretation of 'damage' by the CJEU appears to be in conflict with the wording of article 9 of the EU Directive, which expressly provides that 'damage' excludes the cost of replacement of the defective product itself. This ruling by the CJEU may enable plaintiffs to recover all losses and expenses relating to the use of a defective product, such as the cost of medical monitoring where a medical device or pharmaceutical product have not yet caused injury but may in the future, regardless of how remote that loss may be.

- In addition to exclusion of damage to the defective product itself and imposing a minimum recovery threshold, the UKCPA[918] provides a further limitation in relation to damages arising from property damage. The UKCPA prohibits recovery of damages for

[917] 3.3.1.5.
[918] 3.3.1.8 (i).

harm to property which is not of a description "*ordinarily intended for private use, occupation or consumption" and "intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption*." A similar restriction on recovery of damages for property damage is imposed by the GPLA.[919]

- The ACL[920] provides that a manufacturer of a product with a 'safety defect' may be liable to pay compensation for injuries, death, economic loss as a result of death and damage to property (other than the defective good). A supplier of goods that breach implied consumer guarantees may be held liable for 'damages' under the ACL. Part VIB of the CCA restricts the amount of personal injury damages recoverable for economic loss, loss of earning capacity, superannuation entitlements, gratuitous attendant care and non-economic loss (pain and suffering, loss of amenities of life and disfigurement) and interest. Exemplary and aggravated damages are not available in respect of death or personal injury claims under the CCA. There is no threshold limit or ceiling on a manufacturer's potential liability in relation to property damage under Part 3-5 of the ACL.

- There appears to be consensus among the foreign jurisdictions considered that plaintiffs can generally recover damages for harm or loss arising from personal injury, death and property damage, with the exception of loss arising from damage to the defective product itself. In realtion to property damage, the EU Directive and transposing UKCPA and GPLA impose certain restrictions in the form of a minimum claim threshold. Further, the UKCPA and GPLA impose a restriction requiring the property damaged to be of a kind ordinarily intended for private use or consumption. The US Restatement (Third) and the ACL expressly provide for economic loss arising from personal injury and

[919] 3.3.1.8 (ii).
[920] 3.4.1.5.

property damage to be recovered. The EU Directive leaves it up to member states to determine whether consequential economic loss resulting from personal injury and property damage may be recovered.

3.5.6 Concept of defectiveness

- The US Restatement (Third)[921] contains a trifurcated formulation of defectiveness, setting the liability standard separately for manufacturing, design and inadequate instructions or warnings defects. True strict liability applies to manufacturing defects, with the Restatement (Third) defining this as a deviation by a product from its intended design, even though all possible care was exercised by the producer. Restatement (Third)'s position is that this is not suitable for design defects and inadequate warning defects as the *rationale* for liability in the latter two cases are fundamentally different. For these types of defect, an independent reasonableness standard involving an assessment of the advantages and disadvantages of a product, commonly referred to as 'risk-utility balancing', is required. In brief, a product will have a design or warning defect when the foreseeable risks of harm could have been reduced or avoided by a reasonable alternative design or reasonable instructions or warnings. Although many courts insist on phrasing it as strict liability, the law according to the *Restatement (Third)* has returned in the case of design and warning defects to a type of reasonableness test closely resembling the enquiry into the negligent conduct of a defendant involving reasonable foreseeability and preventability of harm.

- In the context of warning or instructional defects, particularly pharmaceutical and medical device products, the majority of US courts recognise a 'learned intermediary

[921] 3.2.1.6.

doctrine'. Pursuant to this doctrine, a manufacturer may escape liability by showing that it had provided all necessary product information to a learned intermediary, such a treating physician or surgeon, who then interacted directly with the consumer. Whether the producer can rely on the intermediary to instruct or warn the ultimate user is a question of reasonableness.

- In the US, warnings of the risks posed by a product will generally not be sufficient where the plaintiff can prove that a safer alternative design could reasonably have been adopted by the manufacturer. Interestingly, non-manuacturing sellers such as wholesalers or retailers are held strictly liable for design or inadequate warning defects, even though they did not and could not have foreseen the risks. As long as the plaintiff can show that a predecessor of that non-manufacturing supplier could reasonably have prevented the harm by adopting a reasonably safer design or providing better instructions or warnings, it is irrelevant whether the non-manufacturing supplier exercised all reasonable care. Many US courts consider the patent or obvious nature of a particular product's risk as grounds for releasing producers from the duty to warn of those risks.

- The bulk of product liability litigation in the US revolve involve design defects. The reasonableness test prescribed for design defects queries whether a reasonable alternative design would have reduced the foreseeable risk of harm presented by that product and whether failure to adopt that alternative design rendered the product "not reasonably safe". The majority of US courts require proof of a reasonable alternative design, either expressly or impliedly, when conducting a risk-utility analysis of the subject product's design, in order to establish a prima facie case of design defect. A distinct minority of US states apply a consumer expectations test for design

defectiveness without requiring proof of a reasonable alternative design. In these states, courts simply ask whether the product's design failed to meet the expectations of the ordinary consumer. Application of this consumer expectations test in the US appears to be limited to cases involving simple, non-complex products.

- The EU Directive[922] employs a single standard for a product "defect", based on a type of 'consumer expectations' test supported by a list of non-exhaustive factors to be considered by courts. Despite extensive academic criticism of this expectations test relating to its vagueness, ambiguity and circularity, it is broad enough to allow for an objective risk-utility analysis of a product. The UKCPA[923] and GPLA[924] both transpose the concept of defectiveness from the EU Directive without any significant deviation. However, Germany retains a special liability regime in relation to pharmaceutical products, which predates the EU Directive and therefore remains unaffected.

- The German Supreme Court recently referred a question to the CJEU in relation to the meaning of a product "defect" under the EU Directive.[925] The German court's question related to two joined cases involving implanted medical devices, namely a pacemaker and a cardioverter defibrillator. The question was whether a product is defective under article 6 if it forms part of a group of products that have a significantly increased risk of failure, but where a defect has not been identified in each specific product within that group. The CJEU held that consumer expectations ought to be assessed "in the abstract" with regard to the expectations of the "public at large". While the notion of "legitimate expectation" is difficult to define, the expected degree of safety must be

[922] 3.3.1.6.
[923] 3.3.1.8(i).
[924] 3.3.1.8(ii).
[925] 3.3.1.6.

determined by taking into account various factors, including the intended purpose of the product, the nature of the product and the requirements of the group of users for whom the product is intended. The CJEU ruled that, where products belonging to the same production series have been shown to have a "*significantly higher than normal risk of failure*", or in which a "*significant number of failures have already occurred*," all products in that production series can be classified as defective without proof that a specific product was defective. It remains to be seen how member states' courts will interpret and apply the CJEU's ruling, particularly, when exactly products would qualify as presenting a "*significantly higher than normal risk of failure*".

- Despite the CJEU's ruling, there are still areas of uncertainty regarding the EU Directive's defectiveness test, such as what information may be considered by courts. For instance, it is unclear whether product information and warnings supplied to learned intermediaries ('the learned intermediary doctrine') or information supplied directly to consumers ('direct-to-consumer advertising') would be relevant in the assessment.

- The ACL[926] employs a single definition of "safety defect" for all types of defects, based on the safety that persons are generally entitled to expect. The test is an objective standard based on what the public at large, rather than a particular individual, is entitled to expect of a product's safety. The test is supported by a non-exhaustive list of considerations as well as "all relevant circumstances", similar to the EU Directive and the transposing UKCPA and GPLA's definitions of defectiveness. Compliance with mandatory safety standards is only a factor in determining whether goods have a safety defect under the ACL and is not conclusive per se. The role of intermediaries may be relevant to defectiveness under the ACL. In the case of prescription pharmaceuticals

[926] 3.4.1.6.

and medical devices only accessible through learned medical professionals, that comprehensive instructions and warnings may not be provided by the manufacturer to the consumer due to the complex nature of these products. However, detailed product information is provided to doctors and pharmacists by the manufacturers so that these learned intermediaries can properly determine whether to dispense a product to a consumer. Australian courts recognise that the duty to warn of the risks of these products rests with the treating physician, not the manufacturer or distributor. Apart from these cases, Australian courts have to date declined to apply the “learned intermediary” doctrine in product liability cases.

- Overall, the US Restatement (Third) provides a more nuanced approach to defining defectiveness by formulating an independent test for manufacturing, design and warning defects. After decades of experience, American courts clearly do not consider strict liability to be suitable for design and warning defects, therefore returning to a type of negligence standard involving reasonable foreseeability and preventability. This change in American law arguably resulted from political pressure to increase industry protection against excessive liability. A similar change has not occurred in the EU and Australia, where strict, or at least stricter, liability is retained for all types of defects. The EU and Australia still employ a single consumer expectations test for defectiveness involving an objective evaluation of the risks and utility of a product and all the relevant circumstances of the case. This approach is arguably more flexible, allowing courts to determine, in each particularl case, which factors are relevant and the weight to be attributed to each factor.

3.5.7 Defences / Restriction of liability of supply chain

(i) Compliance with public regulation

- The US Restatement (Third)[927] provides that, in the context of design or warning/ instruction defects, non-compliance with an applicable safety regulation renders the product defective with respect to the risks which that regulation aims to reduce. On the other hand, compliance with an applicable safety regulation is a factor in determining defectiveness. In other words, regulatory compliance does not provide a defence *per se* to a strict product liability claim. The reason for this is that most product safety regulations are intended only as minimum standards. In most cases, regulatory compliance has not provided US defendants with a complete defence as regulations are often not comprehensive. However, where regulators have thoroughly evaluated and regulated a certain area of product safety, based on a comprehensive risk-utility analysis, those regulations may fully define the safety standards imposed by tort law on sellers of products, in which case regulatory compliance may be a complete defence.

- The EU Directive[928] provides that a producer can escape liability under article 7(d) of the EU Directive if it can show that "*the defect is due to compliance of the product with mandatory regulations issued by public authorities.*" The wording of this section indicates that the defence is limited to circumstances where the regulations in question create a legal obligation on the producer to comply. In other words, minimum product standards that are not compulsory but rather industry guidelines, would not bring a manufacturer within the realms of this defence. Further, proof of compliance with mandatory regulations do not automatically provide producers with a defence under the EU Directive given that mandatory regulations are often set as minimum safety

[927] 3.2.1.7(i).
[928] 3.3.1.7(i).

standards and compliance with them does not necessarily discharge producers' duty to ensure their products are safe. In 2011, a report by the European Commission on the application of the EU Directive noted that there is very little case law on the application of the regulatory compliance defence in the EU.

- The ACL[929] provides a defence if the manufacturer establishes that the goods had a safety defect solely due to compliance with a Commonwealth mandatory standard for them. A standard which sets out only minimum performance requirements is not a mandatory standard for purposes of Part 3-5 of the ACL. The reason for this is that where a manufacturer is free to exceed the minimum requirements of the standard without sanction, it cannot be said that the standard is the sole cause of the defect. Likewise, where the manufacturer is free to choose how to achieve the performance level required by the standard and chooses a 'defective' method, this defence will not be available to the manufacturer. If a manufacturer establishes this defence, the Commonwealth government of Australia will be liable to compensate the plaintiff.

- There appears to be general consensus among the foreign jurisdictions compared that regulatory compliance is merely a factor in the defectiveness enquiry and would rarely be determinative of the defectiveness question. The reason often cited for this position is that regulations are generally intended as minimum standards and are rarely intended to be complete or comprehensive regulation of a particular safety aspect. The EU Directive and ACL expressly provide a defence where it can be shown that a product is defective solely due to compliance with a mandatory regulation. The US Restatement does not provide for such a defence per se, but recognises that regulatory compliance is a factor in determining defectiveness of a product.

[929] 3.4.1.7(i).

(ii) Absence of defect at time of supply

- The US Restatement (Third)[930] does not expressly provide a defence where it can be shown the alleged product defect did not exist at the time it was supplied by the manufacturer. Nevertheless, such a defence could arguably be raised by a manufacturer in the context of defectiveness or causation by producing evidence that the product was not defective at the time of supply, for instance by showing test results conducted immediately prior to supply. Further, a manufacturer may be able to show, on balance, that the product failed or caused harm due to alteration, modification or tampering after it was supplied by the manufacturer.

- In comparison, the EU Directive[931] expressly provides a defence if a producer can establish that the defect did not exist in the product at the time it was put into circulation or that the defect arose subsequently. This defence would cover the scenario where a producer can show evidence such as compliance with stringent quality control procedures, which justifies the conclusion, on balance, that the product was not defective when it left the producer's control. This defence would be relevant where a product became defective due to misuse, modification or alteration of a product by a party other than the producer after the producer put the product into circulation.

- Like the EU Directive, the ACL[932] expressly provides a defence to a section 138 claim if the manufacturer establishes that the safety defect in the goods did not exist at the time when they were supplied by their actual manufacturer. In the case of electricity, the safety defect must not have existed at the time at which the electricity was generated, in other words, before it was transmitted or distributed.

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930 3.2.1.7(ii).
931 3.3.1.7(ii).
932 3.4.1.7(ii).

(iii) Defect not reasonably discoverable

- The US Restatement (Third)[933] recognises that a producer may be able to defend a claim of design defect by showing that a product design conforms to industry practice and incorporates the most advanced or cutting edge technology or scientific knowledge available. In other words, the manufacturer would not have been able to know, based on the state of scientific knowledge, that the product had a defect. The Restatement (Third) does expressly provide for such a defence, but recognises that evidence of industry practice or the state of the art can be relevant to defectiveness in two ways: Firstly, the defendant may present such evidence to show that an alternative design proposed by the plaintiff was not practicable. Secondly, it may be relevant in considering whether the defendant's failure to adopt the alternative design rendered the product 'not reasonably safe'. In general, US courts agree that conformance with the state of the art is not an absolute defence. The *Restatement (Third)* clearly supports an approach where evidence of the state of the art can play a role, albeit a limited one, in determining defectiveness. However, this defence, commonly known as the 'state of the art' or 'development risk' defence, could be fatal to a plaintiff's claim where a defendant can show that his design maintains the highest degree of safety possible for those products within the market. In such a case, although not theoretically impossible, a plaintiff would rarely be able to prove that the adoption of a reasonable alternative design was practical under the circumstances, thereby implying that the prevailing industry practice as a whole could have been improved upon.

[933] 3.2.1.7(iii).

- The EU Directive[934] expressly provides for a so-called development risk defence in pursuant to which a producer can escape liability by showing that *"the state of scientific and technical knowledge at the time when the product was put into circulation did not enable the producer to discover the defect.* It has been held by the CJEU that the reference to "scientific and technical knowledge" in this defence does not refer to the state of knowledge in the industrial sector within which the producer of the product operates, but rather "*the state of scientific and technical knowledge, including the most advanced level of such knowledge*" in general. In other words, it is irrelevant to the question of liability under the EU Directive that no-one within the particular class of manufacturer takes the necessary steps to eliminate or prevent a defect, if such steps can be taken based on the available knowledge. The defence is directed at the objective state of scientific and technical knowledge available "of which the producer is presumed to have been informed." However, the CJEU qualified this by stating that the relevant knowledge must have been accessible at the time the product was put into circulation. The CJEU conceded that the accessibility of knowledge raises difficulties of interpretation, but held this is a matter for national courts to resolve.

- By 2002, the practical application of the defence was still extremely limited in reported judgments in the EU. Of course, this does not mean the defence was not raised frequently and successfully in out of court negotiations. In 2011, a report by the European Commission on the application of the EU Directive considered, among other things, whether this defence ought to be retained. The report notes that industry and insurance representatives believe removal of the defence would stifle innovation and raise insurance costs. These stakeholders argue the fact that removal of this defence has not had any significant impact in Finland or Luxembourg is due to the size of the

[934] 3.3.1.7(iii).

markets in these member states. On the other hand, consumer representatives are in favour of removing this defence. EU stakeholders have differing opinions regarding the effectiveness of this defence, but recognise that the EU Directive overall strikes an appropriate balance between the competing interests of industry and consumers. It remains unclear exactly what practical effect the development risk defence has had to date in the EU.

- The ACL[935] expressly provides a defence if the manufacturer establishes that the objective "state of scientific or technical knowledge" at the time when the manufacturer supplied the goods, did to enable the manufacturer to discover that safety defect. Since introduction of this defence over twenty years ago, there have been only two reported judgments in Australia that considered this defence, which may be suggestive of its limited impact in practice.

- Accordingly, there is general consensus among the foreign jurisdictions compared that the state of the art or state of scientific knowledge at the time the product was put into circulation or supplied is relevant to the defectiveness enquiry and/or in establishing a state of the art defence. It is unclear to what degree the defence has had an impact on strict product liability in the EU to date, but judicial experience up to 2002 suggests its impact has been extremely limited. In Australia, the defence has only been raised twice in reported judgments in over 20 years. The US experience varies from state to state, given that it is recognised as an absolute defence in some states and in others, it can be used to support an argument that a reasonable alternative design did not exist at the time the product was put into circulation (in other words, no design defect).

[935] 3.4.1.7(iii).

(iv) Apportionment of liability

- The US Restatement (Third)[936] expressly provides for apportionment of responsibility between or among plaintiff, sellers and distributors of defective products and others. The manner and extent of the reduction and the apportionment among multiple defendants are governed by generally applicable rules regarding apportionment of responsibility. A strong majority of US states apply the comparative responsibility doctrine, however the rules or developed principles of apportionment of responsibility vary among the states. Where a plaintiff's conduct amounts to misuse, alteration or modification of a product, this may be relevant to the question of defectiveness, causation or the plaintiff's contributory responsibility. Some states follow a 'modified' comparative fault system, whereby the parties' responsibilities are adjusted in accordance with predetermined thresholds of responsibility. For instance, in some states a plaintiff's recovery is fully barred if the plaintiff is found to have contributed more than 50% to the harm. The seriousness of the plaintiff's 'fault' or contributory conduct and the nature of the product defect are relevant considerations in apportioning responsibility between the plaintiff and supplier.

- The EU Directive[937] expressly provides that, in circumstances where the harm is caused by a defect in the product as well as the fault of the injured person or a person for whom the injured person is responsible, the producer's liability may be reduced or disallowed, having regard to all the circumstances. However, the liability of the producer will not be reduced if the harm is caused by a defect in the product and an act or omission of a third party. This provision is subject to the various member states' national law concerning the right of contribution or recourse. For instance, the UKCPA which

[936] 3.2.1.7(iv).
[937] 3.3.1.7(iv).

transposes the EU Directive, expressly provides that, where harm is caused partly by a product defect and partly by the fault of the injured person, the *Law Reform (Contributory Negligence) Act* 1945 and section 5 of the *Fatal Accidents Act* 1976 (contributory negligence) apply as if the defect were the fault of every defendant liable for the harm caused by the defect. This has the effect of deeming the 'defect' in the product to be the 'fault' of the defendants liable under the UKCPA for harm caused by that defect. This is done to address the theoretical problem of apportioning liability as is done in negligence claims, under a strict liability regime where fault does not feature.

- The ACL[938] expressly provides that, where the loss was caused by both a defect in the goods and an act or omission of the person who suffered injury or loss because of the defective goods, a court may reduce the amount of compensation by an appropriate amount, taking all relevant circumstances into account. The acts or omissions include the acts or omissions of another individual for whom the person is responsible. In appropriate circumstances, the reduction can amount to a complete disallowance of the claim. This provision has a similar effect to the defences of contributory negligence and voluntary assumption of risk in a claim brought in negligence. As between suppliers *inter se,* a manufacturer is liable to indemnify a supplier, who supplied the goods to a consumer, if the supplier is liable for damages under section 259(4) for loss or damage suffered by the consumer and the manufacturer is or would be liable (under section 271) for damages to the consumer for the same loss or damage. The supplier may bring an action against the manufacturer for such legal or equitable relief as the supplier could have obtained if that liability had arisen under a contract of indemnity made between them.

[938] 3.4.1.7(iv).

- There appears to be general consensus among the foreign jurisdictions compared that responsibility ought to be apportionment between the plaintiff and defendants and between defendants inter se. All jurisdictions expressly make provision for apportionment of liability or the reduction of damages recoverable where the harm was caused both by a product defect and the contributory fault or conduct of the plaintiff. It is generally recognised by these jurisdictions that, in extreme cases, a plaintiff's contributory responsibility may be so high that it amounts to a complete disallowance of the claim.

(v) Prescription

- The US Restatement (Third)[939] contains no provisions regarding limitation periods for bringing a product liability claim. Statutes of limitations in each state govern the time limit for bringing product liability claims, which generally varies between two to six years. States also impose repose periods by way of statute, which vary from state to state. A repose period denotes the number of years that consumers can use a product during its useful life before bringing a court proceeding, following expiry of which manufacturers are immune from liability.

- The EU Directive[940] imposes a 3 year limitation period for bringing an action, which commences to run from the day "*the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer*." The EU Directive does not affect member states' laws regarding suspension or interruption of limitation periods. For instance, the UKCPA, which transposes the EU Directive, expressly refers to the UK Limitation of Actions Act and provides clarification as to the

[939] 3.2.1.7(v).
[940] 3.3.1.7(v).

relevant point in time that the limitation periods commence to run in product liability claims under the UKCPA. The EU Directive further imposes a 'long-stop' provision where all rights conferred on the injured person by the EU Directive are extinguished after a 10 year period from the date the producer put the actual product in question into circulation, unless the injured person has brought proceedings against the producer in the interim. The CJEU has held that this long-stop period should be interpreted as commencing from the point at which the product "leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed."

- The ACL[941] expressly provides for a 3 year limitiation period for defective goods actions brought under Part 3-5 of the ACL commencing from the time the claimant becomes aware, or ought reasonably to have become aware, of the particular circumstances that give rise to the cause of action. The ACL further imposes a 10 year repose period, which provides that an action under this part cannot be brought more than 10 years after the supply of the goods by the manufacturer. In relation to personal injury claims in general under the CCA, including actions relating to Part 3-5 or Division 2 of Part 5-4 of the ACL, section 87F of the CCA defines the applicable limitation period as either the "date of discoverability" or the "long-stop period" being a period of 12 years from the date of the alleged act or omission, whichever is later.

- Accordingly, there appears to be general consensus among the foreign jurisdictions compared that a long-stop period ought to be imposed for strict product liability claims. In the US, the relevant limitation periods and repose periods are governed by the various state laws. The EU Directive and ACL both impose a 3 year limitation period

[941] 3.4.1.7(v).

from the date the plaintiff became aware or should reasonably have become aware of the facts giving rise to the cause of action. Further, the EU Directive and ACL both impose a general long-stop period of 10 years from the date of supply of the product, with the ACL adopting a 12 year period in the case of personal injury claims.

(vi) Contractual restriction of liability

- The US Restatement (Third)[942] provides that any contractual limitations, waivers, disclaimers or other exclusion clauses by sellers or distributors do not bar otherwise valid product liability claims against them for harm caused by new products. There is a presumption that the ordinary consumer lacks adequate information and bargaining power to agree to a fair contractual limitation of rights clause in a contract of sale. This does not prohibit parties within the supply chain from contracting among themselves with respect to indemnity.

- The EU Directive[943] provides that the liability of the producer, in relation to the injured person, may not be limited or excluded by a provision limiting his liability or exempting him from liability. Any contractual provision which has the effect of limiting or excluding the producer's liability would therefore be void and cannot be raised as a defence.

- The ACL[944] provides that any consumer guarantees implied by the ACL and any rights and remedies afforded by the ACL cannot be excluded by way of a contractual restriction or exemption clause. The ACL provides that a person may be subject to prosecution under the Act for attempting to do so. Section 25 of the Australian *Competition and Consumer Act* 2010 simply lists examples of terms that may be unfair, for instance, a

[942] 3.2.1.7(vi).
[943] 3.3.1.7(vi).
[944] 3.4.1.7(vi).

term that limits or has the effect of limiting, one party's right to sue another party. In practice, manufacturers and suppliers in Australia would often include a clause in their contracts of sale whereby they exclude all implied warranties and liability, in so far as it is permitted by the ACL and other fair trade legislation. Such a clause may have the effect of excluding common law warranties and liability, however, the manufacturer or supplier would still be bound to comply with the ACL and may therefore still be liable under the ACL for supplying defective goods.

- There appears to be general consensus among the jurisdictions that contractual clauses that have the effect of restricting or excluding the liability of suppliers of defective products, vis-à-vis the plaintiff, are prohibited or void.

CHAPTER 4 - STRICT LIABILITY FOR PRODUCT DEFECTS UNDER THE CONSUMER PROTECTION ACT 2008

4.1 INTRODUCTION: THE CONSUMER PROTECTION ACT 2008

While the bulk of the Consumer Protection Act 2008 ('CPA') came into effect on 31 March 2011, the strict product liability provisions under the CPA have been in operation since 24 April 2010.[945]

In the context of consumer goods, the CPA entrenches fundamental consumer rights and imposing duties on the supply chain to supply safe, good quality, defect-free goods. Further, section 61 of the CPA imposes strict product liability on the supply chain for harm caused by a deficiency in consumer goods. Section 61 enables a harmed consumer to recover compensation from the producer, importer, distributor or retailer without having to prove fault on the part of the defendant. The claimant need establish the existence of a product deficiency, which made the good unsafe or otherwise defective within the meaning of section 53, and that the harm was caused wholly or partly by this defect.

This chapter analyses the key elements of the CPA's strict product liability framework against the background of the American, European and Australian position discussed in Chapter 3. Where relevant, clarification is sought from foreign law to suggest an appropriate interpretation and to clear up potential legal uncertainty arising from the CPA's provisions. In view of the almost complete lack of case law on the CPA, relevant principles, arguments or rules drawn from American, European and Australian law are referred to extensively for possible consideration by South African lawyers and courts grappling with

[945] Schedule 2, Items 2(1) and (2) of the CPA state the following:
"2(1) Chapters 1 and 5 of this Act, section 120 and any other provision authorising the Minister to make regulations, and this Schedule, take effect on the date that is one year after the date on which this Act was signed by the President" i.e. 24 April 2009;
(2) Subject to sub item (3), and items 4 and 5, any provision of this Act not contemplated in sub item (1) takes effect on the date that is 18 months after the date on which the Act was signed by the President.

interpretation issues. Further, the scope of liability for damages arising from product defects under the CPA is compared with pre-existing common law remedies as well as with relevant American, European and Australian law.

Throughout the analysis of the CPA in this chapter, the criteria for evaluating the efficacy of a strict product liability framework, as outlined above at 1.4.3 are applied, namely:

- Does the framework achieve the underlying **legislative purposes** of the CPA including the promotion of consumer protection and consumer access to redress?
- Does section 61 strike a **fair balance between competing interests** of consumers and the supply chain?
- Does the framework provide adequate **legal certainty** to consumers, the supply chain and courts?
- Does the framework provide adequate **flexibility** to adapt to the ever-changing consumer marketplace and technological advancements resulting in new products, new ways of transacting and increased access to information?

4.1.1 Purpose and policy of the CPA

The purpose of the CPA, as outlined in section 3, is to promote and advance the social and economic welfare of South African consumers by, *inter alia*:

- establishing a legal framework for a "consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally";
- reducing any disadvantages in accessing the supply of goods or services experienced by consumers
    - who are low-income persons or who comprise low-income communities;

- who live in remote, isolated or low-density population areas;
- who are minors, seniors or other similarly vulnerable consumers; or
- whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited due to low literacy, vision impairment or limited fluency in the language in which the representation is made;

- protecting consumers from trade practices that are unconscionable, unfair, unreasonable, unjust or improper and other deceptive, misleading, unfair or fraudulent conduct;
- providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- "providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers."

Van Eeden[946] notes that the CPA appears to be particularly focused on the position of more vulnerable consumers and to reduce any disadvantages experienced by such consumers in accessing goods or services. Indeed, the Preamble to the CPA recognises the social and economic inequality in South Africa, such as high levels of poverty and illiteracy, and the need for a legal framework which promotes a culture of consumer rights and responsibilities, business innovation and which can deal with technological changes and new methods of trading.

It is argued that the CPA's stated aim of establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient,

[946] *Consumer Protection Law in South Africa* (2013) 40.

sustainable and responsible, for the benefit of consumers generally is a principal purpose of the CPA which *"supports and sustains the overall structure and other purposes of the Act."*[947] It is important to note that, while the overall focus or purpose therefore appears to be "for the benefit of consumers generally", the use of words such as "fair" and "sustainable" suggests that the CPA is also concerned with balancing the relevant interests of consumers and the supply chain to ensure that the consumer market is sustainable. Indeed, if industry becomes overregulated and burdened with excessive liability rules, the cost of producing goods may become so high that access to goods are reduced, which would not benefit "consumers generally", particularly vulnerable consumers in a developing country such as South Africa.

4.1.2 Interpretation of the CPA

Section 2(1) provides that the CPA must be interpreted in a manner that gives effect to its legislative purposes set out in section 3(1). This appears to suggest that the CPA's provisions ought to be interpreted in accordance with the so-called purposive method of interpretation, as opposed to a strict literal or textual interpretation.[948] However, De Stadler points out that, despite the CPA's clear injunction to interpret its provisions purposively, any method of statutory interpretation other than a literal, plain reading of the words is not warranted where the language is clear and unambiguous.[949] She argues that, in light of the legislative purposes in section 3(1), which are generally aimed at promoting the social and economic welfare of consumers in South Africa, any ambiguous provisions in the CPA

[947] 41.
[948] The main theories of statutory interpretation are discussed above at 1.1.
[949] *Section 2* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 2-3 to 2-4. See also discussion of the purposive method of interpretation above at 1.1.

would be interpreted in favour of the consumer, particularly vulnerable consumers referred to in section 3(1)(b).[950]

Section 4(3) expressly endorses a purposive interpretation where a provision may have more than one meaning, as follows:

> *"if any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)."*

It is questioned whether an interpretation that favours a consumer would always be in the interest of consumers generally. An interpretation that favours a particular consumer may create an unfavourable precedent for consumers in a broader sense.[951] Van Eeden is in favour of a more balanced approach than that prescribed by section 4(3).[952] He argues that the CPA's purpose of establishing a legal framework, *inter alia*, for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible and for the benefit of consumers generally,[953] clearly contemplates a "*balancing of rights and remedies that will be fair not only to suppliers and consumers, but that will also be efficient."*[954]

Section 4(2)(b)(i) of the CPA provides that the National Consumer Tribunal and courts "must promote the spirit and purposes of the Act" in any matter before it "in terms of the

[950] *Section 2* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 2-4.
[951] De Stadler *Section 4* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 4-8.
[952] *Consumer Protection Law in South Africa* (2013) 39-40.
[953] Section 3(1)(a).
[954] Van Eeden *Consumer Protection Law in South Africa* (2013) 40.

Act". Van Eeden argues that the use of the word "spirit" is to indicate that the CPA should not be interpreted overly literally, rather the CPA should be interpreted in a manner that *"facilitates the realisation and enjoyment of consumer rights."*[955] De Stadler argues that this section either suggests the purposes of the CPA should be considered even in circumstances where the ordinary meaning of the CPA's wording is not ambiguous, or it is merely a repetition of the injunction to interpret the CPA purposively as stated in section 2(1).[956] If this provision means that courts can deviate from any clear wording of the CPA, it would be contrary to the established rules of statutory interpretation.[957]

Section 2(2) provides that, when interpreting the CPA, a person, court or tribunal or the National Consumer Commission may consider appropriate foreign and international law, appropriate international conventions, declarations or protocols relating to consumer protection and decisions of a consumer court, ombud or arbitrator in terms of the CPA. It is argued that any reference to foreign law in the statutory interpretation process should be done cautiously, given that there are fundamental differences in legal traditions between jurisdictions and unique policy contexts have shaped legislative regimes in those jurisdictions.[958] Nevertheless, where ambiguities exist in the wording of the CPA's provisions and a court is required to approach the interpretation in a broader, purposive manner, it may be useful to consider similar provisions in comparative foreign regimes for guidance as to the meaning of a provision or concept and any past judicial interpretations of those provisions by foreign courts, keeping in mind the legislative context of that foreign provision and the particular role played by courts in that jurisdiction in statutory interpretation and judicial law-making. Even if a South African court does not follow the

[955] 41.
[956] *Section 4* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 4-7.
[957] Ibid.
[958] De Stadler *Section 2* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 2-5.

approach in a foreign regime, consideration of such foreign law and developments may assist South African courts in avoiding interpretations which could create undesired precedents or difficulties in the future.

Section 2(10) provides that no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.[959] This indicates that the CPA is not intended to revoke or change the common law, but rather to co-exist with it. It is argued that section 2(10) should be considered in light of the interpretive presumption that the legislature does not intend to affect the existing common law, unless this is expressly stated to be the intention in the statute.[960] According to Du Plessis, this presumption means that "*legislation must…be interpreted in the light of the common law, must as far as possible be reconciled with related precepts of the common law and must be read to be capable of co-existing with the common la*w."[961]

In light of this interpretive presumption and in the interest of legal certainty, an interpretation of the CPA in a manner that remains as consistent as possible with the existing common law framework for product liability in South Africa is supported.[962]

4.1.3 Duties and Liability of the Supply Chain

The duty of the supply chain under the CPA can be seen as two-fold: on the one hand, suppliers of goods have a duty to supply safe, good quality goods by ensuring that goods

[959] Section 2(10).
[960] De Stadler *Section 4* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 2-9.
[961] *Re-interpretation of statutes* (2002) 178.
[962] See also, for instance: Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) *Stell LR* 17 at 417 where it is argued that introduction of a strict product liability framework should, in the interest of legal certainty, remain as consistent with the existing common law framework as possible.

comply with relevant safety standards and regulations and implementing adequate safety and quality control measures, while on the other hand, withdrawing defective goods from the market and compensating those who were harmed by defective goods.

The CPA provides two distinct avenues of redress in circumstances where a defective good has been sold. First, the CPA provides remedies not aimed at damages where the goods sold do not meet certain requirements or standards prescribed by the CPA.[963] These requirements are discussed further below in this section. At common law, a claimant who has purchased defective goods would have to avail himself of the remedies under the law of sale, which are only available to claimants in a direct contractual relationship to the seller of the goods (privity of contract). [964]

Second, the CPA provides in section 61 a remedy aimed at damages where a person has suffered harm due to personal injury, property damage or consequential economic loss caused by defective, unsafe or hazardous goods or where inadequate warnings or instructions accompanied the goods. Under the common law of sale, sellers are not subject to such liability, save for circumstances where:

- the seller breached an express/tacit warranty,
- the seller made a fraudulent or negligent misrepresentation regarding the quality of the goods; or
- where the seller is also a manufacturer or merchant seller who publicly professed to have the attributes of skill and expert knowledge in relation to the kind of goods sold.[965]

[963] Sections 20 and 56(1) read with section 55.
[964] These remedies are discussed in Chapter 2.
[965] De Stadler *Section 55* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 55-3.

With respect to the first category of remedies for defective goods not aimed at damages, it is necessary to briefly discuss the requirements or standards prescribed by the CPA for goods. The CPA imposes on the supply chain a duty to supply 'safe and good quality goods'.[966] Pursuant to section 56(1), the producer, importer, distributor and retailer each warrant that goods comply with four general standards or requirements set out in section 55. Pursuant to section 55(2), consumers have a right to receive goods that:

> *(a) "are reasonably suitable for the purpose for which they are generally intended;*
> *(b) are of good quality, in good working order and free of any defects;*
> *(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and*
> *(d) comply with any relevant standards set under the Standards Act, 1993 (Act 29 of 1993), or any other public regulation."*

Further, section 55(3) provides that, if a consumer specifically informed the supplier of the purpose or use for which the consumer intends to acquire the goods, and the supplier ordinarily supplies such goods or acts in a way which is consistent with being knowledgeable about the use of those goods, the consumer is entitled to receive goods are reasonably suitable for the specific purpose that the consumer had disclosed.

In determining whether goods satisfy the requirements of section 55(2) or (3), courts must consider all of the circumstances of the supply of the goods, including but not limited to:

> *a) "the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of those goods;*

[966] Section 55.

b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and

c) the time when the goods were produced or supplied."[967]

For purposes of this test, it is irrelevant whether a product failure or defect was latent or patent or whether it could have been detected by a consumer before taking delivery of the goods.[968] Further, a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.[969]

The standards or requirements in section 55(2)(a) and (b) do not apply in circumstances where the consumer was expressly informed that the goods were offered in a specific condition, and the consumer expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.[970]

The implied warranty as to safe, good quality goods applies only to the extent that the goods have not been altered contrary to product instructions or after leaving the control of the relevant supplier.[971] By comparison, the Australian position under the ACL is that goods do not fail to be of acceptable quality if the consumer causes them to become of unacceptable quality or fails to take reasonable steps to prevent them from becoming of unacceptable quality and they are damaged by abnormal use.[972] The limitation of the equivalent warranty under the CPA only refers to scenarios where products are 'altered' by consumers and appears to be a narrower limitation of the warranty. However, the words

[967] Section 55(4).
[968] Section 55(5)(a).
[969] Section 55(5)(b).
[970] Section 55(6).
[971] Section 56(1).
[972] Section 54(3) and discussion at 3.4.1.6 above.

"altered contrary to product instructions" could potentially be interpreted to include any misuse by consumers which reduces or "alters" the safety or quality of the goods.

The standards in section 55 do not apply to goods bought at auction. While section 56 does not expressly exclude goods bought at auction, it is argued that, because section 56 only applies to goods which do not meet the standards contained in section 55, the remedies in section 56 would not be available in respect of goods purchased on auction.[973] Given the exclusion of auctions from section 55, an advisory note of the South African Consumer Goods and Services Ombud ('CGSO') advises consumers who purchase at auctions to inspect goods beforehand, preferably with the assistance of an expert.[974]

Further, the CGSO advises that section 61 liability for defective goods does not expressly exclude goods sold by way of auction, which creates an 'anomalous' situation in that a seller by auction may be excluded from liability for breaching section 55, but cannot escape liability under section 61.[975] However, the CGSO advises that the seller by auction may be able to rely on the defence in section 61(4)(c) if it was unreasonable to expect the seller to have identified the unsafe product characteristic, failure, defect or hazard, in light of that seller's role in marketing the goods.[976]

The exclusion of auction sales from the standards in section 55 and, arguably by implication section 56, is consistent with the Australian position under the ACL, which excludes sales by auction from the implied consumer guarantees as to acceptable quality

[973] De Stadler *Section 55* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 55-3.
[974] http://www.cgso.org.za/wp-content/uploads/2016/05/Advisory-Note-16-Auctions.pdf?87ab66 at 3.
[975] Ibid.
[976] Ibid.

and fitness for purpose.[977] Further, similarly to the view held by Australian consumer protection bodies,[978] consumer transactions via online auction sites in South Africa may be subject to section 55 of the CPA in circumstances where the online auctioneer, such as eBay, does not act as an agent of the vendor in the traditional auction sense but merely provides an online platform for vendors and buyers to communicate.[979]

Where goods fail to meet the standards or requirements set out in section 55, the consumer may, within six months after delivery, return the goods to the supplier without penalty and at the supplier's risk and expense.[980] Further, the supplier must, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods or refund the price paid by the consumer. If the supplier repairs goods or any component in the goods and within three months after repair, the failure, defect or unsafe feature has not been remedied, the supplier must replace the goods or refund to the price paid by the consumer.[981]

Under the CPA, the consumer is not required to prove that the goods were defective at the time of conclusion of the contract, rather at the time the consumer receives the goods.[982] This is a departure from the common law position, where a buyer bringing an aedilitian

[977] 3.4.3 (i) supra.
[978] 3.4.3 (i), particularly the view of the Australian Competition and Consumer Commission (footnote 378).
[979] It should be noted that online auctions are subject to the general rules governing electronic transactions in South Africa contained in the Electronic Communications and Transactions Act 25 of 2002 ('ECTA'). Pursuant to section 2(9)(a) of the CPA, the provisions of the CPA and ECTA would apply concurrently to online auctions to the extent that it is possible without contravening either act. See: Consumer Goods & Services Ombud 'Advisory Note 16: Auctions' at 1.
[980] Section 56(2).
[981] Section 56(3).
[982] De Stadler *Section 55* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 55-5.

action must show that the goods were defective at the time of conclusion of the contract of sale.[983]

The remedies provided by the CPA for failure of goods to meet the requirements set out in section 55(2) are distinct from the remedy provided under section 61. As Naudé correctly points out, strict liability for harm arising from a product defect under section 61 is not dependent upon proof that the requirements of section 55(2) were not met.[984] Further, these remedies are aimed at different types of redress (i.e. not damages) as outlined above. While the CPA's wording and structure do not, on the face of it, indicate a link between the requirements of section 55(2) and section 61 liability, it is argued that there is an inevitable conceptual overlap or interrelationship between the section 55(2) standards and the various concepts of product defectiveness for purposes of section 61, as defined in section 53. For instance, goods that are not 'free of defects' within the meaning of section 55(2)(b) may simultaneously be 'unsafe' or contain a 'defect' or 'hazard' for purposes of section 61, and vice versa. Therefore, the section 55(2) requirements and the non-exhaustive list of factors in section 55(4) for assessing whether these requirements are met, may provide South African Courts with some guidance in determining whether goods have a 'defect', 'failure', 'hazard' or an 'unsafe' characteristic for purposes of section 61.

By way of comparison with the Australian jurisdiction, there appears to be a similar interrelationship between the consumer guarantee as to 'acceptable quality'[985] and the

[983] Naudé 'The consumer's right to safe, good quality goods and the implied warranty of quality under sections 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) *SA Merc LJ* at 339.
[984] 345.
[985] Section 54 ACL.

defectiveness standard for purposes of manufacturer's strict liability under the ACL.[986] The guarantee of 'acceptable quality' requires, inter alia, that goods be 'free from defects' and 'safe'. It is arguable that goods which are not 'free from defects' and not 'safe', in breach of the implied consumer guarantees, could simultaneously qualify as goods with a 'safety defect' for purposes of manufacturer's strict liability under the ACL.[987] This interrelationship between breach of consumer guarantees and manufacturer's liability for goods with a 'safety defect', despite not being expressly stated in the ACL, is reflected in Australian legal practice, as discussed in the Case Study below.[988] In brief, the plaintiffs brought actions for damages under the ACL against a manufacturer and supplier for supplying goods containing a 'safety defect' and alternatively, goods that breached the consumer guarantees as to acceptable quality and fitness for purpose, as well as claims in negligence and breach of contract. Where the pleadings alleged that the goods contained a 'safety defect' for purposes of manufacturer's strict liability under the ACL, the particulars pleaded of that 'safety defect' included allegations that the goods supplied were not of acceptable quality or reasonably fit for purpose, in breach of the implied consumer guarantees under the ACL.

In practice, South African lawyers may similarly seek to particularise the concepts of 'defect', 'hazard', 'failure' or 'unsafe' characteristic for purposes of a section 61 action by pleading, inter alia, that the goods failed to comply with the requirements of section 55(2), having regard to the manner in which they were marketed, packaged or displayed, any instructions or warnings accompanying the goods or the reasonably anticipated uses of

[986] Section 138 ACL.
[987] Section 138 ACL.
[988] 4.5.3(i).

the goods. Any non-compliance of goods with the requirements in section 55(2) may support or reinforce the allegation of 'defectiveness' for purposes of section 61.

The CPA further imposes a duty on the supply chain to warn consumers of hazards arising from, or associated with, the use of goods. This duty arises from the fact that a supplier will be liable pursuant to section 61(1)(c) for supplying a good with inadequate warnings of a 'hazard' associated with that good. A 'hazard' is defined in section 53 as a characteristic that has been identified as, or declared to be, a hazard in terms of any other law or that presents a 'significant risk' of personal injury or damage to property when utilising the goods.

In the context of warnings accompanying goods, suppliers of goods have a duty to provide consumers with information in plain and understandable language.[989] In particular, section 22 provides that the producer of a notice, document or visual representation that is required in terms of the CPA or any other law to be produced, provided or displayed to a consumer, must do so in the form prescribed by the CPA or any other legislation, and if no form has been prescribed, then in 'plain language'.[990]

Section 58(2) provides that a person who packages any hazardous or unsafe consumer goods must display on or within that packaging a notice that complies with the requirements of section 22 and any other applicable standards and provides the consumer

[989] Section 22.

[990] According to section 22(2), 'plain language' is language that enables an ordinary consumer (of the class of persons for whom a notice, document or visual representation is intended), with average literacy skills and minimal experience as s consumer of the relevant goods or services, to understand the content, significance and import of a document, notice or visual representation *without undue effort*, having regard to a number of listed factors. For a discussion regarding the meaning of section 22, see Stoop *Section 22* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 22-1 to 22-11.

with adequate instructions for the safe handling and use of those goods.[991] Various labelling regulations exist for particular categories of goods, for instance, label regulations published under the *Foodstuffs, Cosmetics and Disinfectants* Act.[992] In addition, regulations 6 and 7 of the CPA regulations provide labelling guidelines for textiles, clothing, shoes, leather goods and genetically modified organisms.

Further, a person who installs any hazardous or unsafe goods contemplated in section 58(2), or supplies any such goods in conjunction with the performance of any services, must provide the consumer with the original copy of any document required in terms of section 58(2) or any similar document applied to those goods in terms of another public regulation.[993]

As contended earlier in this section with respect to the relationship between sections 55 and 61, the duties imposed on the supply chain by sections 22 and 58(2) and regulations 6 and 7 regarding product information and packaging, may provide guidance to South African courts in assessing whether goods were accompanied by an inadequate warning of a hazard for purposes of an action for damages pursuant to 61(1)(c). Further, a claim under section 61(1)(c) may, in appropriate circumstances, be supported in pleadings by particularising breaches of sections 22, 58(2) or regulations 6 and 7.

[991] Section 58(2). See discussion below at 4.2.6.1(v) in the context of inadequate warnings or instructions. See also discussion below at 4.3.1 of a consumer complaint considered by the Consumer Goods and Services Ombud: (20131220550) [2014[ZACGSO (29 April 2014), regarding the adequacy of product instructions and warnings accompanying a tub of drain cleaner (caustic soda) in light of section 22 of the CPA. See at http://www.cgso.org.za/wp-content/uploads/2015/11/Compendium-of-cases_30_OCT_2015.pdf?87ab66 at 83.

[992] Act 54 of 1972. The regulations were published in Government Gazette 146 GN 32975, 1 March 2010.

[993] Section 58(4)(a) and (b).

4.2. SECTION 61: LIABILITY FOR HARM CAUSED BY DEFECTIVE GOODS

Against the backdrop of the duties imposed on the supply chain by the CPA, the two distinct avenues for redress provided by the CPA where defective goods are sold, (one aimed at damages, the other not) and the potential conceptual interrelationships between the CPA's provisions for these avenues for redress and the duties imposed on the supply chain, this chapter now turns to a critical, comparative analysis of the legislative framework for the remedy aimed at damages under section 61 of the CPA.

4.2.1 Parties Liable

Section 61(1) of the CPA imposes liability on the producer or importer, distributor or retailer for harm arising from deficient goods irrespective of whether these suppliers operated 'on a for profit basis or otherwise' and whether they were required or licenced by statute to provide goods or services.[994]

Section 61 does not expressly restrict liability to traders operating on a commercial basis. However, pursuant to section 1 the term 'supply' in the context of goods includes "*sell, rent, exchange and hire in the ordinary course of business for consideration."* Further, the respective definitions of a producer, distributor, retailer and importer in section 1 all involve the concept of supplying goods in the ordinary course of business.[995] This would exclude, for instance, individuals selling second-hand goods privately and not in the course of business.

[994] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-3.
[995] Ibid.

Section 5(5) provides that *"if any goods are supplied…to any person in terms of a transaction that is exempt from the application of this Act, those goods and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61."* This creates a situation where a seller in a private, once-off sale would be exempt from liability under Section 61, but not the producer, importer, distributor or retailer, who had supplied the goods in the ordinary course of business prior to that private once-off sale.[996] De Stadler argues that section 5(5) indicates a retailer (as buyer) would have a claim against the distributor (as seller) or the producer and distributor (as buyer) against the producer, noting that section 61 liability arises in relation to the entire supply chain and is joint and several.[997] She points out that section 5(5) may also have the (potentially unintended) effect of protecting retailers and distributors who would otherwise be liable to the ultimate user of the product, as it makes section 61 applicable to the supply transactions between the retailer and producer, or between the distributor and producer.[998] This legal uncertainty could arguably have been avoided if the CPA had expressly provided for a right of recourse to retailers and distributors against the producer and the circumstances where this would be available.[999]

By comparison,[1000] the ACL imposes strict liability for harm arising from defective goods on both 'manufacturers' and 'suppliers' under various provisions, whereas the EU Directive imposes strict liability on a 'producer' which includes importers of products into the EU. The US Restatement (Third) imposes liability on *"one who is engaged in the business of selling or otherwise distributing products*." The scope of potential defendants under the

[996] Ibid.
[997] De Stadler *Section 5* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 5-40A.
[998] 5-40A.
[999] See also discussion below at 4.2.7.4 regarding apportionment of liability.
[1000] 3.5.1.

CPA therefore appears generally consistent with the Australian and American position. The EU Directive's scope of potential defendants is narrower than the CPA in that its definition of 'producer' does not include distributors or retailers outright. However, distributors or retailers may be held liable under the EU Directive if they are unable to identify their own supplier upon request by the plaintiff. No such barrier exists in bringing a section 61 claim against a non-manufacturing supplier under the CPA, which arguably assists plaintiffs, particularly vulnerable plaintiffs, by not requiring them to first attempt to ascertain the identity of the producer. Plaintiffs can simply bring section 61 claims directly agains the retailer or another commercial distributor of the product.

A "producer" is defined by section 1 of the CPA as a person who:

> (a) *"grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business"; or*
> (b) *by applying a personal or business name, trade mark, trade description or other visual representation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a)."*[1001]

The content of the CPA's definition of 'producer' is very similar to section 7(1)(a)-(d) of the definition of 'manufacturer' contained in the ACL.[1002] However, the ACL includes the word 'assembles', which would cover scenarios where a manufacturer assembles components acquired from other suppliers or manufacturers. The reference in the CPA's definition of 'producer' to "*otherwise produces the goods*" appears to be a type of catch-all phrase

[1001] Section 1 CPA.
[1002] 3.4.1.1.

which is arguably broad enough, based on the plain meaning of the words, to include assembly of components. In any event, it would seem contrary to the spirit and purpose of the CPA of protecting consumers against harmful products to exclude assemblers of components from strict liability. It is not apparent what justification there could be for arbitrarily excluding from liability assemblers of components. While it would have been preferable to expressly include ‘assemble’ in the definition of ‘producer’ under the CPA, as done by the ACL, the plain wording of the CPA’s definition of ‘producer’ appears to be broad enough to include producers who assembled components.

A further difference between the CPA and ACL‘s definitions of ‘producer’ relates to the inclusion of importers of goods in the ACL's definition of ‘manufacturer' in circumstances where the manufacturer did not have a place of business within Australia at the time of importation.[1003] By comparison, section 61 of the CPA directly imposes liability on ‘importers’, which is defined separately in the CPA, regardless of whether the producer of the goods had a place of business in South Africa. An importer of defective goods in South Africa is therefore more exposed than an importer in Australia, in that it cannot escape strict liability as a ‘producer’ by identifying a South African place of business of an overseas producer. The CPA’s position arguably provides greater protection to South African consumers in that it creates a stronger safety incentive for importers, faced with the risk of strict liability, to ensure they import products from reputable overseas producers.

A 'distributor' means a person who, in the ordinary course of business is supplied with those goods by a producer, importer or other distributor, and in turn, supplies those goods

[1003] Ibid.

to either another distributor or to a retailer.[1004] The imposition of strict liability on distributors makes the CPA's scope of defendants broader than the scope of defendants to damages claims for defective products under the ACL. In particular, the ACL only provides a remedy to a 'consumer' to claim damages against a 'supplier' where the latter supplied the goods to the 'consumer'.[1005] The only other way an Australian distributor could be subject to a damages claim under the ACL would be if it fails to provide details of the manufacturer of the goods to the plaintiff within a prescribed time, in which case the distributor would be a deemed manufacturer under the ACL.[1006] The US Restatement (Third) [1007] expressly imposes liability on all distributors in that it refers to persons who engage in the business of 'distributing' products and is therefore seemingly in line with the CPA position. As noted above, distributors are not directly liable under the EU Directive, but may be if they are unable to identify their own supplier upon request by the plaintiff.[1008]

An 'importer' means a person who brings goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.[1009] As noted above, the ACL only deems importers to be manufacturers in circumstances where the manufacturer did not have a place of business in Australia at the time of the importation.[1010] The implication of the CPA's wording is that an importer would be liable under section 61 irrespective of whether the manufacturer had a place of business in South Africa at the time of importation.

[1004] Section 1 CPA.
[1005] 3.4.1.1.
[1006] 3.4.3(ii).
[1007] 3.2.1.1
[1008] 3.3.1.1.
[1009] Section 1 CPA.
[1010] 3.4.1.1.

A 'retailer' is defined as a person who, in the ordinary course of business, supplies goods to a consumer.[1011] Imposition of section 61 liability on retailers appears consistent with the US position in that the Restatement (Third) which imposes liability on anyone who is engaged in the business of 'selling goods'.[1012] It also appears consistent with the ACL which imposes liability on 'suppliers', albeit under a different section than the action against 'manufacturers'.[1013] The EU position differs from the CPA in that the EU Directive restricts liability to producers and importers, and only in some instances, other suppliers.[1014]

Section 61-liability is joint and several and is imposed on all parties who participate in the retail process, from the producer to the retailer.[1015] Joint and several liability of the supply chain arguably serves the underlying purpose of the CPA by ensuring that a consumer has access to adequate redress, particularly in circumstances where the consumer has difficulty locating or identifying the manufacturer of the goods. The consumer may be able to recover 100% of damages against the retailer who directly supplied the goods without the need to identify the producer. At common law, two or more defendants to an Aquilian action, or concurrent wrongdoers, are also jointly and severally liable.[1016]

[1011] Section 1 CPA.
[1012] 3.2.1.1.
[1013] 3.4.1.1.
[1014] 3.3.2.
[1015] Section 61(3).
[1016] 2.3.1.

The scope of potential defendants in a section 61 claim is significantly broader than a common law contractual claim for damages, which would be limited to the party with whom a consumer-plaintiff had contracted for the supply of the good (privity of contract).[1017]

The scope of potential defendants under section 61 is also broader than a common law delictual claim for damages. The Aquilian action can theoretically be brought against the actual manufacturer of the defective good, provided this party can be identified, and possibly a subsequent supplier(s) such as a distributor or retailer, provided the plaintiff can establish that this party owed a duty of care to the plaintiff with respect to the supply of the good. For example, where a non-manufacturing supplier does not have the opportunity to open packaged or sealed products and inspect them for defects before supplying them to a consumer, a plaintiff may have difficulty establishing that that supplier owed a duty of care to the plaintiff to do so. Even if products can be inspected, where a supplier is a general retailer of a broad range of products and does not possess the expertise to identify defects in complex products, it is doubtful that a plaintiff could establish a duty of care owed by that retailer. In contrast, the section 61 action simply requires that the defendant meets the definition of either ‘producer’, ‘importer’, ‘distributor’ or ‘retailer’ in respect of the goods within the meaning of the Act. Accordingly, even where the plaintiff cannot identify the actual producer of the good, he or she may be able to identify a number of other parties in the supply chain against whom the section 61 action can be brought.

4.2.2 Potential Claimants

The wording of section 61 is ambiguous as to whether it provides a remedy to a ‘consumer’ as defined in the CPA or whether the remedy extends to persons other than a

[1017] 2.2.

'consumer', such as bystanders or other product users. The reason for this is that sections 61(1)(c) and 61(2) make reference to "the consumer", whereas sections 61(5)(a)-(b) refer to death or illness of, or injury to "any natural person".

The definition of "consumer" contained in section 1 includes:

> *(a) a person to whom goods or services are "marketed in the ordinary course of the supplier's business;"*
> *(b) "a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the Act by section 5(2) or in terms of section 5(3);"*
> *(c) "if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services;*
> (d) *..."*

If it is assumed that section 61's references to "any natural person" were meant to be references to "consumer" as defined it is nevertheless unclear, based on the definition of "consumer" in section 1, whether a section 61-claimant is required to meet the description of a consumer to whom the goods were marketed or who has received the defective good pursuant to a transaction with the supplier, as noted in paragraphs (a) and (b) of the definition, or whether it will suffice that the claimant is a mere 'user' of the goods pursuant to paragraph (c). Van Eeden argues that section 61(1) liability would be a circumstance where the "context so requires or permits" that a user of a product would be included in the definition of "consumer", pursuant to paragraph (c) of the definition of "consumer".[1018] This view is supported, as there appears to be no rational justification for excluding from the

[1018] *Consumer Protection Law in South Africa* (2013) 44.

protection of section 61 those persons who are not “consumers” within the meaning of paragraphs (a) or (b) of the definition of “consumer.” Such an arbitrary limitation on the scope of potential claimants under section 61 would certainly not be in the interest of advancing the welfare of consumers generally, particularly vulnerable consumers, in South Africa.

However, the exact scope of “user” of goods for purposes of paragraph (c) of the definition of “consumer” is not clear. For example, in the context of electricity, would this mean when a person who actively operates an electrical appliance or switches on a light in his or her house? Or would it also include a person who has the use of the electricity “forced” on him or her or inadvertently uses the electricity? For instance, an infant whose parent switches on an electrical lamp beside the infant’s bed. The infant is arguably making practical use of the bedside lamp but does not operate it. Further, if a person accidentally touches an electricity line, which by its nature is meant to be distributed or conducted along a tangible medium, thereby receiving the electricity in a sense, would that qualify as “using” the electricity? Arguably, coming into direct contact with a distribution line thereby suffering an electrical shock would not quality as making practical and effective use of the electricity. Another example is a client at a hair salon whose hair is being curled by a hairdresser with a curling iron. The client is not operating the electrical appliance, but nevertheless receives some benefit it.

A further question raised by electricity is whether it could not also be a “service”. As noted above, a minority of US courts have held that electricity is not subject to product liability as

it is a service, not a product.[1019] If we assume that electricity can also qualify as a "service" under the CPA, even though it is expressly included under the definition of "goods", a person who is a "recipient or beneficiary" of that electricity would also qualify as a "consumer" under paragraph (b) of the definition of "consumer". This then raises the question whether a person who inadvertently comes into contact with an electricity line, thereby "receiving" the electricity, would be a "consumer" of the electricity.[1020] However, on balance, the fact that electricity is expressly included under the definition of "goods" and the prevailing position in the foreign jurisdictions compared, electricity should be regarded as "goods" as opposed to a "service".

Section 5(1) of the CPA provides that the Act applies to:

> (a) *"every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);*
> (b) *the promotion of goods or services, or of the supply of goods or services, within the Republic unless -*
> *(i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (1); or*
> *(ii) the promotion of the goods or services has been exempted pursuant to subsection (3) and (4);*
> (c) *goods or services that are supplied pursuant to a transaction to which this Act applies, regardless of whether any of those goods or services are offered or supplied in conjunction with, or separate from, other goods or services; and*
> (d) *goods supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided in subsection (5)."*

[1019] 3.2.1.3.
[1020] As was the case in the recent *Halstead-Cleak* cases in South Africa, discussed below at 4.5.2.

Section 5(2) lists transactions that are exempt from the CPA. These transactions include, *inter alia*, transactions where the State is the consumer or where the consumer is a juristic person with an asset value or annual turnover of more than R2 million.

With respect to paragraph (b) of the definition of "consumer", being a person who has entered into a "transaction" with a supplier in the ordinary course of the supplier's business, the CPA defines "transaction" to mean:

> *"(a) in respect of a person acting in the ordinary course of business –*
>
> *(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or*
>
> *(ii) the supply by that person of any goods to or at the direction of a consumer for consideration;*
>
> *(iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or*
>
> *(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (2)."*

"Consideration" is defined to mean "anything of value given and accepted in exchange for goods and services" and includes the following:

> *"(a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;*
>
> *(b) labour, barter or other goods or services;*
>
> *(c) loyalty credit or award, coupon or other right to assert a claim; or*

> *(d) any other thing, undertaking promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier an consumer or other parties in addition to the supplier and consumer;*

In other words, to receive goods as a "consumer" within the meaning of paragraph (b) of the definition of "consumer" pursuant to a "transaction", the person must have provided something of value in exchange for the goods. This requirement for "consideration" pursuant to a "transaction" does not apply in the case of a "consumer" within the meaning of paragraph (a) or (c) of the definition of "consumer".

As noted above at 4.1.2, section 5(5) provides that, even where goods are supplied in terms of a transaction that is exempt from the CPA, those goods and the importer, producer, distributor and retailer of those goods are nevertheless subject to section 60 (safety monitoring and recall) and strict liability under section 61. Section 5(1)(d) read with section 5(5), arguably highlights the importance placed by the legislature on access to redress for consumers harmed by product deficiencies and that they should nevertheless have the protection of section 61 even if they did not receive the goods pursuant to a "transaction" or as a "consumer" within the meaning of paragraph (b) of the definition of "consumer".

By comparison, the US *Restatement (Third)* imposes strict liability for harm to '*persons or property'*.[1021] This wording does not appear to restrict the remedy to consumers in a contractual sense, but would include any person who suffers loss as a result of personal injury or property damage caused by a defective product. The EU Directive refers to

[1021] 3.2.1.2.

liability to an 'injured person' which arguably also provides a remedy to any person who suffers 'injury' or harm to his or her health or property, not just consumers.[1022] The ACL restricts the scope of 'consumers' for purposes of claims against 'suppliers' under section 272 of the ACL (breach of consumer guarantees) by means of either a monetary cap on the value of the goods acquired or by excluding goods that are not goods '*of a kind ordinarily acquired for personal, domestic or household use or consumption*.'[1023] The requirement for goods to be of a kind ordinarily acquired for personal, domestic or household use or consumption is applied broadly in Australian practice.[1024] Actions against manufacturers under the ACL for harm caused by goods are available to either 'an individual', a 'person' who suffers loss because of injuries to an individual, (for instance, a dependant) or 'an affected person in relation to the goods'.[1025] The wording of the provision relating to actions against manufacturers under the ACL arguably provides scope for claims to be brought by product users other than 'consumers' who acquired the goods, bystanders who are harmed by the use of defective goods or dependants of persons harmed by defective goods. The prevailing position in these foreign jurisdictions therefore appears to be that strict product liability actions are not only available to persons who are 'consumers' in a contractual sense, but rather any person or individual who suffers harm due to defective goods which were supplied commercially.

In light of the consumer protectionist policy underlying the CPA, the ambiguity created by the wording of section 61 and the prevailing position in the foreign jurisdictions considered in this study, it is argued that section 61 should be interpreted as being available to all persons falling within paragraph (c) of the definition of "consumer" under CPA, in other

[1022] 3.3.1.2.
[1023] 3.4.1.2.
[1024] Ibid.
[1025] 3.4.1.1.

words, including users of goods. This position was recently confirmed by the Supreme Court of Appeal in *Eskom Holdings Limited v Halstead-Cleak*.[1026] Again, as noted above, it is unclear exactly when a person would qualify as "using" goods. The SCA did not elaborate on this, merely noting that the Concise Oxford Dictionary[1027] defines "utilise" as "make practical and effective use of."[1028] If a person accidentally touches an electricity line, which by its nature is meant to be distributed or conducted along a tangible medium, thereby receiving the electricity in a sense, would that qualify as "using" the electricity? Arguably, coming into direct contact with a distribution line thereby suffering an electrical shock would not qualify as making "practical and effective use" of the electricity and so the SCA may be correct on the facts in *Halstead-Cleak*. However, there are many other instances where it is unclear when a person would be considered as "using" electricity as discussed above in this section.

Further, it has to be questioned whether electricity could not also be a "service". As noted above, a minority of US courts have held that electricity is not subject to product liability as it is a service, not a product.[1029] If we assume that electricity can also qualify as a "service" under the CPA, even though it is expressly included under the definition of "goods", a person who is a "recipient or beneficiary" of that electricity would also qualify as a "consumer" under paragraph (b) of the definition of "consumer". This then raises the question whether a person who inadvertently comes into contact with an electricity line, as in the *Halstead-Cleak* scenario, thereby "receiving" the electricity, would be a "consumer" of the electricity.[1030] However, on balance, the fact that electricity is expressly included

[1026] ZASCA [2016] 150 at [15]. This case is discussed in detail below at 4.3.2.
[1027] (2011) 2 ed.
[1028] [24].
[1029] 3.2.1.3.
[1030] As was the case in the recent *Halstead-Cleak* cases in South Africa, discussed below at 4.5.2.

under the definition of “goods” and the prevailing position in the foreign jurisdictions compared, electricity should perhaps be regarded as “goods”. However, it is possible that electricity could be regarded as both a “good” and a “service” of supplying a good.

The High Court and SCA in the recent *Halstead-Cleak* cases had divergent views to the scope of application of section 61, which is discussed in detail below at 4.5.2. At first instance, the High Court held that an injured person need not be a ‘consumer’ as defined in section 1 in order for section 61-liability to arise. The court relied, amongst other things, on the reference to ‘*any natural person’* in section 61(5)(a) and (b) as opposed to ‘consumer’ together with section 5(5) in support of its view and found that it would be “*contrary to the spirit and purpose of the CPA*” to exclude from the protection of section 61 innocent third parties who are harmed by defective goods. The facts of this case concerned a plaintiff who sustained severe electrical injuries while riding his bicycle when came into contact with a low-hanging live power line spanning across a footpath.

The SCA overturned the High Court’s decision. The SCA noted that the meaning of the definition of “consumer” in paragraph (c) of the definition indicates that a person who is a user of the goods may also qualify as a “consumer”. However, the SCA stressed the fact that there must be a “*transaction to which a consumer is a party, or the goods are used by another person consequent on that transaction*.” The SCA held that when one considers the legislative purposes of the CPA, as outlined in section 3, coupled with the definition of “consumer” and “transaction”, it is clear that the *“whole tenor of the Act is to protect consumers*.” With respect to section 61, the SCA noted its context within the CPA, namely that it falls within Chapter 2 dealing with “Fundamental Consumer Rights”, in particular, Part H which deals with the “right to fair value, good quality and safety” and that this

indicates *"the harm envisaged in section 61 must be caused to a natural person mentioned in section 61(5)(a) in his or her capacity as a consumer. This is the only businesslike interpretation possible*."

The SCA's view that the goods must have been supplied pursuant to a "transaction" to which a "consumer" was a party appears to be consistent with the Australian Federal Court's position in *Cook v Pasminco Ltd.*[1031] In this case, the plaintiffs brought claims in negligence and nuisance, as well as under sections 75AD and 75AG of the former TPA (the equivalent of section 138 under the ACL) due to alleged injury to their health after being exposed to emissions of noxious fumes from the defendants' industrial plants. For purposes of the TPA claims, the Federal Court had to consider, amongst other things, whether the fume emissions were 'goods', 'manufactured' by the defendants and 'supplied in trade or commerce' within the meaning of the TPA and if so, whether those goods contained a 'defect'. With respect to the claims under section 75AD and 75AG, the plaintiffs alleged that the emissions were 'goods manufactured' by the defendants and 'supplied' by the defendants to the plaintiffs, that the goods had a 'defect', being a harmful impact on human health and damaging to safety of land, buildings or fixtures owned by the plaintiffs. The court firstly considered the concept 'supply', which was defined in section 4(1) of the TPA as follows:

> *" 'supply' when used as a verb, includes:*
>
> *"(a) in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and*
>
> *(b) in relation to services – provide, grant or confer…"*

[1031] [2000] FCA 677 (12 May 2000), discussed at 3.4.1.2.

The court held that a necessary element of the "supply" concept is that it is a "bilateral and consensual process" which is not the case here as the plaintiffs allege the toxic emissions were inflicted on them without their consent.[1032] The court found that no evidence could establish that the emissions passed from the defendants as part of a "*consensual transaction or dealing*" and therefore, it could not be established that there was a "supply" for purposes of section 75AD and 75AG.[1033] With respect to the requirement that the 'supply' must have occurred 'in trade or commerce', the court held that this expression does not only refer to the supplier's general commercial activities, rather the supply itself must form part of an activity or transaction which has a *"trading or commercial character*."[1034]

Of course, *Cook v Pasminco* must be understood in the particular context of the legislative provisions it applied. Nevertheless, it is useful to note that the Australian equivalent of section 61 of the CPA is only available in cases where the goods were supplied by way a commercial transaction or exchange and an individual was harmed by those goods.

The position with respect to bystanders injured by defective goods is not so straightforward. On the face of it, the CPA's definition of "consumer" does not appear to include bystanders who are harmed as a result of defective goods being used by another person (the consumer or user). However, upon closer consideration of paragraph (c) of the definition of "consumer", there is some ambiguity, at least in the context of electricity as discussed above, as to when a person would be considered to "use" the electricity or when a person is simply receiving an inadvertent benefit from the electricity as a bystander.

[1032] At [24].
[1033] At [27].
[1034] [28] - [29].

Further, the ordinary, literal meaning of “any natural person” in section 61(5) would appear broad enough to include “bystanders” harmed by product use, as opposed to the references to “consumer” elsewhere in section 61, and this further creates ambiguity which arguably warrants a purposive interpretation. The welfare of consumers generally would not necessarily be promoted by imposing strict liability for harm to bystanders caused by defective products. The imposition of strict product liability on any bystanders may open the floodgates of litigation and impose an excessively onerous burden on industry, thereby stifling innovation and resulting in reduced access to consumer goods. The CPA’s purpose of estabslishing a framework for a ‘sustainable’ consumer market would perhaps not be served by inclusion of bystanders. It may be that the legislature deemed it more appropriate for harm to bystanders to be governed by Aquilian liability, which requires the bystander to establish the product supplier owed a duty of care to him or her in the circumstances, which arguably provides more scope for a fair outcome than strict liability in this context.

This argument is further supported if we consider, for example, the case of electricity of South Africa. There are millions of illegal connections to the Eskom grid. If a court held that Eskom was strictly liable to bystanders harmed by any defective wiring or low-hanging power lines arising from these illegal connections, Eskom would not be able to continue operating and provide a very essential product to vulnerable consumers. Further, a defence of contributory or comparative causation[1035] against the bystander would not succeed here as the bystander is not the one who had established the illegal connection and did not choose to use electricity via an illegal connection, as was the case in *Halstead-*

[1035] 4.2.7.4.

Cleak.[1036] On the other hand, this defence would arguably be available against a section 61 plaintiff who had created the illegal connection or who "used" the electricity through that illegal connection.

It is worth noting that no reference was made to bystanders in the draft definition of "consumer" in the Consumer Protection Bill either. If it was the legislature's intention to provide bystanders with the protection of section 61, arguably the definition of "consumer" would have expressly included bystanders.

As stated above, the prevailing position in the foreign jurisdictions compared appears to be to protect any individual harmed by defective goods, which arguably includes bystanders. However, it should be borne in mind that the foreign jurisdictions compared are all developed countries, whereas in a developing country such as South Africa it may be too onerous on the supply chain and less beneficial to the welfare of consumers generally to impose strict product liability for harm to bystanders.

In the interest of legal certainty, it would have been preferable for the legislature to refer consistently in section 61 to either "consumers" or "persons" harmed by goods and to specifically state whether bystanders harmed by defective goods are protected by section 61. However, the Supreme Court of Appeal has recently held in *Eskom Holdings Limited v Halstead-Cleak*.[1037] that the reference to "natural person" in section 61(5) was merely to distinguish it from "person" or a "consumer" which may also include a juristic person.

[1036] *Halstead-Cleak v Eskom Holdings Limited* [2015] JOL 33332 (GP) and *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150 discussed below at 4.5.2.
[1037] ZASCA [2016] 150 at [15]. This case is discussed in detail below at 4.3.2.

In light of the wording of section 61 read with the definition of “consumer” in section 1 and the SCA’s decision in *Halstead-Cleak*, the position in South Africa appears to be that:

- section 61 would be available to a product user who is harmed by a good that was subject of a “transaction” to which a “consumer” (not necessarily the user) is a party;
- section 61 is not available to a bystander harmed by goods being used by a consumer or product user.

The scope of potential claimants in a section 61 action is broader than a contractual claim for damages, which is limited to claimants who had entered into a contractual agreement with the defendant for supply of the goods in question (privity of contract). A section 61 claimant need not have entered into a transaction with a supplier of defective goods.

The scope of potential section 61-claimants appears broader and narrower to the scope of potential claimants in a delictual damages claim in different respects. Generally speaking, the scope of potential claimants under a section 61 claim is broader than the scope of claimants under a delictual claim on the basis that a section 61 claimant need not establish the supplier of the defective goods owed a duty of care to it. A section 61 claimant merely has to show that goods with a deficiency of some kind were supplied by the defendant in the ordinary course of business and the claimant was harmed by it. For instance, a product user may bring a section 61 claim and alternatively, a delcitual claim provided it can be shown the product user was owed a duty of care by the defendant in the circumstances.

In other respects, the scope of potential claimants in a section 61 claim is narrower than the common law. A bystander does not appear to have a claim under section 61 as a

bystander does not meet the definition of "consumer", whereas a claim in delict may arise if it can be shown that the supplier of the defective product owed a duty of care not to cause harm to the bystander, in other words, that the harm to that bystander was reasonably foreseeable by the supplier. If we take the example noted above of the millions of illegal connections to Eskom's national electricity grid, it is possible that harm caused by illegal connections would be reasonably foreseeable by Eskom.

4.2.3 Goods

The CPA provides a very broad definition of "goods", which include:

> *(a) "anything marketed for human consumption;*
> *(b) any tangible object not otherwise contemplated in paragraph (a) including "any medium on which anything is or may be written or encoded;*
> *(c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium," or a license to use any such intangible product;*
> *(d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section;*
> *(e) gas, water and electricity."*[1038]

The wording of this definition indicates that it is not intended to provide an exhaustive list.[1039] However, it is difficult to identify products that would not be covered by this extended definition.

By comparison, the ACL similarly provides a non-exhaustive list of items that would qualify as 'goods' for purposes of the ACL.[1040] Interestingly, the only items that are common to

[1038] Section 1 CPA. See discussion of *Halstead-Cleak v Eskom Holdings Limited* [2015] JOL 33332 (GP) and *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150 below at 4.5.2. In this case, Eskom was held to be the 'producer' and 'distributor' of electricity within the meaning of the CPA.

[1039] De Stadler Section 5 in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 5-6.

both the CPA and the ACL's respective definitions are: gas, electricity and software. The EU Directive's definition of 'product' does not contain the word 'include' and appears to provide an exhaustive list of items or categories of items that would constitute a 'product'.[1041] The EU Directive previously excluded all primary agricultural products and game, but included primary agricultural products which have undergone 'initial processing'. Following an amendment in 1999, the EU Directive now applies to *"all movables, even if incorporated into another movable or into an immovable*." By comparison, the CPA's definition of 'goods' contains no express exclusion of any types of products and is broader than the EU Directive's definition in that it also includes legal interests in immovable property. The US Restatement[1042] contains a more general description of what constitutes a "product" without listing a number of items or categories that are included. The Restatement defines a 'product' as "*tangible personal property distributed commercially for use or consumption."* Real property and electricity would only be products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property.

The CPA's definition of "goods" expressly includes electricity, which is consistent with the prevailing position in the foreign jurisdictions considered.[1043] An interesting question is at what point in time does electricity becomes a "good" for purposes of product liability. In this regard, the majority of US courts have held that electricity would qualify as a product subject to strict product liability once it is distributed to the consumer through the meter.[1044] A number of US courts have held that high voltage electricity in distribution lines would not be subject to product liability as it has not yet been converted to a form for delivery to a

[1040] 3.4.1.3.
[1041] 3.3.1.3.
[1042] 3.2.1.3.
[1043] 3.5.3.
[1044] 3.2.1.3.

consumer. It is interesting to compare the American approach with the facts considered in the South African case of *Halstead-Cleak*[1045] where a plaintiff was injured by high-voltage electricity from a low-hanging distribution power line. The majority of American courts would not consider the harm-causing electricity in this case to be a product for purposes of strict product liability as it was not, at the time of the harm-causing incident, in a form for delivery to a consumer. A minority of US courts have held that electricity is not subject to product liability as it is a service, not a product.[1046]

The CPA's definition of "goods" makes no reference to "component goods" which are later integrated into finished goods. However, section 53(1) defines the various types of product deficiencies referred to in section 61 and states that these deficiencies apply in respect of "any goods" and also "any component of any goods". Therefore, it seems clear that defective component goods are also subject to section 61. By comparison, the definition of "goods" under the ACL[1047] expressly includes "*any component part of, or accessory to goods"* with the effect that manufacturers of defective component goods are also strictly liable. The EU Directive's definition of 'product' makes no reference to component products.[1048] However, the definition of 'producer' under the EU Directive includes a 'manufacturer of a component part', thereby bringing component products within the scope of the EU Directive. Similarly, the US Restatement's definition of 'product' does not refer to component products, but the Restatement specifically provides elsewhere for the liability of commercial sellers or distributors of product components.[1049] Accordingly, the CPA's

[1045] See discussion of *Halstead-Cleak v Eskom Holdings Limited* [2015] JOL 33332 (GP) and *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150 below at 4.3.2.
[1046] 3.2.1.3.
[1047] 3.4.1.3.
[1048] 3.3.2.
[1049] 3.2.2.

position regarding component goods is consistent with the foreign jurisdictions considered.

The CPA departs from the EU Directive,[1050] which has traditionally been considered to impose strict liability for defective ‘tangible’ goods, by including in its definition of ‘goods’ an open-ended category of intangible, informational or intellectual products. Information or data in itself, as obtained and distinguished from the physical medium on which it is written, qualifies as a ‘good' under the CPA. Examples would include any data or software loaded onto a CD, USB device or computer hard drives, such as support software, e-books, films, music, online subscription databases, professional support programs such as accounting technical design programs or any other data purchased online in downloadable format. It would also include any software or applications loaded onto mobile phones or tablets and even ‘virtual items' such as purchases made within online games.

By comparison, the ACL's definition of ‘goods' includes ‘computer software' but does not include the range of other intangible or informational goods as provided in paragraph (c) of the CPA's definition of ‘goods'.[1051] Computer software generally includes so-called ‘application software', being programs that perform specific functions for users (e.g., Microsoft Excel or Word), and ‘system software', being operating systems for computers and programs that support application software (e.g., Windows or Linux). Using the example of a legal database, the program that ‘houses' the data and is used to access and search the data (so-called database management system) would be a software ‘good', however, the actual data contained in the legal database is not software. It is unclear whether the information itself contained on the database would be considered a ‘good'.

[1050] 3.3.1.3.
[1051] 3.4.1.3.

The compilation of information on the database is arguably a product or 'good' which is 'supplied' to consumers by providing access to the database in exchange for a subscription fee.

The US Restatement (Third)[1052] defines 'products' as "tangible personal property" and makes no reference to intangible or informational goods. However, there is scope to read intangible, informational products into this definition of 'products' given that it states '*other items….are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property*.'[1053]

Importantly, this information category referred to in the CPA's definition of "goods: may potentially also include the informational content of professional advice, for instance, engineering or architectural designs, supplied in electronic format to clients. If this is the case, harm caused by a 'defect' in this professional advice would be subject to strict liability. Loubser & Reid point out that, if this was indeed the intention of the legislature, it constitutes a '*radical departure from the common law (Aquilian) basis of professional liability.*'[1054]

If it was truly the South African legislature's intention to impose strict liability on professional advisory service providers, this would arguably have been expressed in clearer terms in the CPA. An argument against a legislative intention to impose section 61-liability for the informational content of professional advisory services is the fact that the

[1052] 3.2.1.3.
[1053] Ibid.
[1054] *Product Liability in South Africa* (2012) 82-83.

CPA expressly and separately regulates services in section 54.[1055] Further, section 61(2) also suggests the CPA does not intend to impose strict liability on service providers, as it only imposes strict liability for defective products supplied in conjunction with those services. Nevertheless, it is suggested that the position regarding liability of professional service providers could be clarified in the CPA in the interest of legal certainty. For instance, the definition of 'goods' in section 1 could be amended so as to exclude any informational content of any professional advice or other intellectual content (such as technical designs or drawings) or section 61 could expressly state that it does not apply to any services.

Further, it is possible that the open-ended concept of "information" may cover generally disseminated information or knowledge relied upon by an incalculable number of consumers or users who have not obtained the information in terms of a particular consumer transaction. For instance, incorrect information posted on an internet website has a nearly infinite global reach, and millions of people could potentially rely on this information to their detriment. The potentially wide-spread harm caused by defective information raises concerns of indeterminate liability.[1056] For this reason, coupled with the policy consideration that the threat of strict liability could *"inhibit the socially and economically desirable free dissemination of ideas and theories*," Loubser & Reid argue that liability should be limited by negligence in such cases.[1057]

[1055] A discussion of section 54 is beyond the scope of this study. For a detailed discussion of this provision see: De Stadler Section 54 in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 54-1 to 54-23.

[1056] Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) 3 *Stell LR* at 434.

[1057] Ibid.

This view is further supported on the basis that neither the EU Directive, nor the ACL nor the US Restatement specifically includes a range of intangible, intellectual or informational products in their definitions of ‘goods', which suggests that the CPA may be casting the net too wide in this respect.[1058] As noted above, the US Restatement's definition of “product” is arguably broad enough to cover intangible, informational goods, however it is left to American courts to assess, on a case by case basis, whether such an item would fall under the definition of ‘products' having regard to the context of its distribution. This would have been a preferable approach to defining ‘goods’ under the CPA, as it would provide South African courts with the discretion to decide whether information supplied in a particular instance ought to be subject to section 61 liability given the context of its distribution.

Alternatively, strict liability for defective informational goods could, as a minimum, be regulated more extensively by defining in clearer terms:

- the types of informational goods covered by the intangible information category;
- whether the supply of electronic information or advice provided as part of professional advisory services is included in the category of informational goods and how this would impact on existing industry-specific standards prescribed for professional service providers and established common law liability for professional negligence;
- the extent of liability of the various parties involved in the supply of defective information having regard to their respective roles in relation to the information, for instance, authors, editors, software design engineers, website or system operators and the manufacturers of the physical media on which information is written.

[1058] 3.5.3.

The CPA's definition of 'goods' makes no reference to "second-hand goods". This is consistent with the position under the EU Directive[1059] and the US Restatement.[1060] By contrast, the ACL specifically includes second-hand goods in its definition of 'goods'.[1061] It would appear that the wording of the EU Directive and US Restatement's respective definitions of 'product' is broad enough to read in 'second-hand goods'. Likewise, it is arguable that the wording of paragraph (a) of CPA's definition of "goods" is equally broad enough to read in 'second-hand goods', where such goods are marketed for human consumption and provided 'consumption' is read to mean consumption of goods in the economic sense. However, given that the plain meaning of paragraph (a) of "goods" is not ambiguous and simply does not refer to second-hand goods, it would seem that a deviation from this is contrary to the rules of statutory interpretation. Therefore, somewhat surprisingly, the High Court has held that the CPA applies to second-hand or "used goods".[1062] The CPA defines the term "used goods" in section 1, but this term is never used in the Act. De Stadler notes that this definition is presumably a remnant of an earlier draft of the CPA.[1063] In *Vousvoukis v Queen Ace CC t/a Ace Motors*, this definition of "used goods" was used to argue that the CPA does not apply to used goods, which was rejected by the court. It is questioned whether this judgment is correct, given that the definition of "goods" does not raise any ambiguity which justifies a deviation from the plain meaning of its words.

If we assume that the definition of "goods" does raise ambiguity as to whether second-hand goods are included, thereby warranting a purposive interpretation, it is doubtful

1059 3.3.1.3.
1060 3.2.1.3.
1061 3.4.3(i)
1062 *Vousvoukis v Queen Ace CC t/a Ace Motors* (unreported, case no 3878/2013, [2015] ZAECGHC 64 (19 June 2015).
1063 Section 5 in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 5-6.

whether the underlying purpose of the CPA would favour a reading-in of "second-hand goods." While it would extend the scope of protection to consumers where they are harmed by such goods, the counter argument to this is that over-regulation and imposition of strict liability for harm caused by such goods may reduce consumers' access to such goods. In the unique context of South Africa with its high poverty levels and vulnerable consumers, it is doubtful whether imposition of strict liability for second-hand goods would promote the welfare of consumers generally.

Section 61 does not exclude goods bought at auction. Accordingly, where goods bought at auction cause harm, the buyer may be able to bring a section 61 claim for damages against the supplier, but will not be able to rely on section 56(2) to claim repair, replacement or a refund.[1064] By comparison, the ACL excludes goods bought at auction from the consumer guarantees as to acceptable quality and fitness for purpose, but not from the provisions relating to liability of a manufacturer for harm caused by defective goods.[1065] Neither the US Restatement (Third)[1066] nor the EU Directive[1067] excludes goods bought at auction from strict liability for harm. The CPA is therefore consistent with foreign jurisdictions in this regard. The welfare of consumers generally would arguably not be best promoted by excluding from strict liability those suppliers who sell defective or harmful goods via auction.

Pursuant to section 61(2), a supplier of services who, in conjunction with performing those services, applies, supplies, installs or provides access to goods, is deemed a supplier of

[1064] De Stadler *Section 55* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 55-3.
[1065] 3.4.1.3.
[1066] 3.2.1.3.
[1067] 3.3.1.3.

those goods for purposes of section 61 liability.[1068] Examples would include healthcare professionals supplying or administering pharmaceuticals or installing medical devices while performing medical services, or an electrician who installs electrical components while repairing or modifying an electrical installation. As a result of this section, suppliers of professional services may be held to two different standards: a fault-based standard with respect to professional services rendered and strict liability for goods supplied in conjunction with the professional services.[1069]

The scope of "goods" which may be the subject of a section 61-claim is arguably no broader than the scope of goods for purposes of a common law contractual or delictual claim for damages. However, this is subject to how broadly South African courts will interpret the broad categories or items listed in the CPA's definition of 'goods'. With respect to second-hand goods, the scope of goods under section 61 appears to be broader than the common law of delict. It has been held by a South African court that the CPA applies to "used goods". On the other hand, a manufacturer may not owe a delictual duty of care to a plaintiff with respect to the safety of second-hand goods where those goods had passed through multiple previous owners.

4.2.4 Causation

Section 61(1) imposes liability for harm "*caused wholly or partly as a consequence of*" a product defect relating to goods. Once a defect is established, a consumer must prove a causal link between that defect and the harm suffered. At common law, causation

[1068] Section 61(2).
[1069] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-8, citing *Van Wyk v Lewis* 1924 AD 438 at 444.

generally involves a two-fold enquiry: factual and legal causation.[1070] In the absence of further provisions regarding the evidentiary burden of parties to a section 61 action, courts are likely to follow the common law test for causation. This is consistent with the approach in the foreign strict product liability regimes compared, where the applicable test for causation is not expressly prescribed.[1071] Courts in these jurisdictions have therefore resorted to applying general principels of causation prevailing in their respective jurisdictions, generally involving a factual enquiry and a more normative, legal causation question.

For purposes of factual causation, a plaintiff may experience evidentiary difficulties in circumstances where, for instance, the defective product has been ingested or destroyed or where the plaintiff suffered a non-traumatic injury such as developing a medical condition. This is often the case with pharmaceuticals or other substances intended for human ingestion. Complex expert evidence is often required regarding the likely cause of the medical condition, which places a heavy, and often costly, evidentiary burden on plaintiffs. Leading such expert evidence may ultimately not provide an answer to causation on a balance of probabilities, due to a myriad of physiological and environmental factors that may have played a role or increased the risk of the condition developing in the particular consumer.[1072] Stapleton[1073] notes that if environmental factors created a background risk for the condition to develop in any event and this does not differ much from the risk attributed by the product, a consumer may be unable to establish causation on a balance of probabilities.

[1070] 2.3.1(a)(iii).
[1071] 3.5.4.
[1072] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-7.
[1073] *Product Liability* (1994) 281.

A further example of cases where evidentiary difficulties arise is where defective goods, often electrical goods, are alleged to have caused a fire which destroyed property and the goods themselves. Unless forensic investigations following the fire can point, on balance of probabilities, to a product failure as the root cause or origin of the fire, it may be difficult to establish liability against the supplier or manufacturer. From the defendant's perspective, it may be equally difficult to defend such claims where the fire occurred years prior to commencement of the claim and the damaged property has been repaired or rebuilt in the interim. Without sufficient information regarding the product which is alleged to have caused the fire, such as serial numbers or other identifying features, it is difficult for manufacturers to trace the production of the goods in question, its service history and whether there was any prior notification of performance issues suggestive of a defect.

Difficulty often arises in establishing factual causation where there are two or more competing, but independent potential causes of the harm and there is insufficient evidence to establish, on a balance of probabilities, which of those causes is the cause of the harm. The South African Constitutional Court has recently delivered a judgment regarding the appropriate test for factual causation in these scenarios in *Lee v Minister of Correctional Services.*[1074] It is argued that, in essence, the majority judgment of the CC seems to support the so-called 'material contribution to risk' approach, recognised by some common law jurisdictions as a solution to the inadequacy of the 'but-for' test in ambiguous factual causation cases.[1075] Generally speaking, a 'material contribution to risk' approach allows factual causation to be made out against a defendant where the plaintiff can show that a negligent act by that defendant, out of a number of negligent acts by multiple defendants

[1074] 2013 (2) SA 144 (CC), discussed in detail at 2.3.1.1(iii).
[1075] Veldsman 'Factual causation: One size does not fit all' (2013) *De Rebus*, where a discussion is provided of the application of this approach in the USA, the UK and Canada.

or other causes, materially increased the risk of injury, without proving actual 'but-for' causation. This approach is typically applied in cases where it is impossible to determine which defendant(s) or causes, out of a number of defendants or causes, were responsible for the harm.

Based on the Constitutional Court's judgment in *Lee* it appears that, in ambiguous factual causation cases where a plaintiff's harm may plausibly have been caused by a defective product and another, unrelated negligent act or cause, a plaintiff may establish factual causation against the defective product supplier simply by showing the defective product had increased the risk of harm. However, the Constitutional Court does not make it clear whether the contribution to the risk of harm ought to have been a material or substantial increase in risk, or whether a minuscule increase in risk would be enough to establish factual causation in these cases. Judicial clarification would be welcomed in this regard.

It is worth noting that a 'material contribution to risk' doctrine or approach has been applied in the US[1076] as an alternative to the traditional 'but for' test for factual causation in product liability cases where there are competing theories of factual causation. However, these cases appear to be limited to claims involving asbestos-related diseases due to multiple exposures to different asbestos products and/or other non-tortious, atmospheric/environmental exposures to asbestos. The reason for the exception in these cases is that medical science is currently not able to ascertain which asbestos fibre or fibres caused the asbestos-related disease, which usually develops many years after exposure. By comparison, in the UK [1077] a 'material contribution to harm' test and a 'material contribution to risk of harm' test have been applied in numerous contexts

[1076] 3.2.1.4.
[1077] 3.3.1.8(i).

including mesothelioma resulting from asbestos exposure, pneumoconiosis resulting from silica dust exposure, dermatitis due to brick dust exposure and in medical negligence cases. However, it appears that the material contribution to harm or risk of harm test for causation has not yet been applied in any reported product liability case law in the UK. Nevertheless, given the numerous instances where this test has been recognised in other contexts, it may only be a matter of time before it is extended, in appropriate cases, to product liability claims brought under the UKCPA or in negligence.

It remains to be seen whether courts in South Africa would follow the *Lee*-judgment in section 61 claims where there are competing theories of factual causation for the plaintiff's harm as opposed to harm caused by defective goods. Such an approach would arguably go a long way to assist plaintiffs in overcoming the inherent difficulties posed by the traditional 'but-for' test for plaintiffs in product liability cases, as is evident from product liability cases under the Aquilian action. [1078]

While the CPA does not expressly provide for this, it is argued that courts could allow for a presumption or inference of defectiveness, analogous to the *res ipsa loquitur* doctrine at common law, to assist plaintiffs in cases where harm was suffered due to a manufacturing defect and that harm was of a kind ordinarily occurring as a result of such a defect.[1079] With such an inference, the evidential burden would then shift to the manufacturer to provide an alternative explanation as to the cause of the accident or by establishing one of the statutory defences in section 61(4).[1080]

1078 2.3.1(iii).
1079 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at at 61-7.
1080 Ibid.

An inference of defectiveness is consistent with the approach in foreign jurisdictions where strict product liability applies.[1081] For instance, the US Restatement (Third)[1082] provides for an inference of defectiveness under the so-called 'malfunction doctrine.' This doctrine has a similar effect to the *res ipsa loquitur* doctrine by allowing courts to draw an inference of defectiveness when justified by the facts surrounding the harm-causing incident. The onus then shifts to the defendant to rebut that inference of defectiveness. The US experience indicates that the malfunction doctrine is most often applied in cases involving alleged manufacturing defects, but is occasionally applied in design defect cases.

By comparison, the EU Directive simply provides that the onus is on the claimant to prove a defect and the causal link between the defect and harm suffered, with no reference to a *res ipsa loquitur* type doctrine.[1083] Dutch courts have found that the evidentiary burden imposed on plaintiffs under the EU Directive is too heavy and therefore apply a similar doctrine to US courts' malfunction doctrine.[1084] If a plaintiff can show that he or she used a product normally and did not misuse it, there will be a factual presumption that a defect in the product caused the harm. Again, the burden would then shift to the manufacturer to establish the product was not defective.

The GPLA[1085] similarly provides for an inference of negligence to be drawn in cases where the plaintiff can show the damage was caused by an objective safety deficit of the product which existed at the time the product was put into commercial circulation, provided the

1081 At 61-6, citing, for example, the US case of *Escola v Coca-Cola Bottling Co v Fresno* 24 Cal 2nd 453, 150 P 2d 436 CA 1944 and the Dutch case of *Leebeek/Vrumona* BGH 129, 353, NJW 1995, 2162. See also the discussion of this approach applied in the US at 3.2.1.4 and Germany at 3.3.1.8(ii) above.
1082 3.2.1.4.
1083 3.3.2.
1084 3.3.1.4.
1085 3.3.1.8(ii).

harm caused is of a kind that would ordinarily be caused by a product defect. If a product malfunctions in circumstances where it is expected that the product would not fail, a *prima facie* case of defectiveness is made out. The evidentiary burden is then shifted to the defendant who has to establish whether the product malfunction was due to a manufacturing or design defect. If there was a manufacturing defect, the defendant is strictly liable. If there was a design error, the evidentiary burden shifts back to the plaintiff who has to show the possibility of a safer, alternative design.

The ACL[1086] does not provide for a similar inference to be drawn. The ACL merely provides that an inference that goods have a safety defect is not to be made by courts solely due to the fact that, after they were supplied by the manufacturer, safer goods of the same kind were supplied. The ACL also prohibits an inference of a safety defect to be drawn solely because the goods complied with a Commonwealth mandatory standard which was not the safest possible standard in light of the state of scientific or technical knowledge at the time the goods were supplied by the manufacturer.

Alternatively, if South African courts were not inclined to apply a *res ipsa loquitur* type doctrine to assist section 61 plaintiffs, which they have yet to do in a product liability case under the Aquilian action[1087] it may be necessary for the legislature to intervene here. It is suggested that the CPA could expressly provide for a presumption or inference of defectiveness for purposes of section 61-claims, like the so-called 'malfunction doctrine' contained in section 3 of the US Restatement (Third), which could perhaps be worded along the following lines:

[1086] 3.4.1.4.
[1087] 2.3.1.1 (iii).

> *It may be inferred that the harm sustained by a person contemplated in section 61(5)(a) or (b) was caused by a defect, hazard, failure or unsafe characteristic in goods existing at the time of supply of the goods by the producer or importer, distributor or retailer without proof of a specific defect, hazard, failure or unsafe characteristic when the incident that harmed that person,*
>
> *(a) was of a kind that ordinarily occurs as a result of a defect, hazard, failure or unsafe characteristic of goods; and*
>
> *(b) was not, in the particular case, solely the result of causes other than a defect, hazard, failure or unsafe characteristic of the goods existing at the time of supply by the producer, importer, distributor or retailer.*

The difficulties arising from the EU Directive's lack of guidance as to causation is illustrated by a series of recent UK judgments applying the UKCPA where differing views were expressed on the level of specificity required of a plaintiff with respect to proving defectiveness and causation.[1088] The position appears to have been settled recently, at least in the UK, to the effect that a plaintiff is not required to *"specify or identify with accuracy or precision the defect in the product. It is sufficient to prove the existence of a defect in broad or general terms," for instance "a defect in the electrics of the Lexus (motor car*)." If this position is to be followed by English courts in the future without qualification, it would arguably assist claimants substantially in establishing defectiveness as well as causation for purposes of a UKCPA claim.

[1088] 3.3.1.8(ii).

A factor that may be relevant to causation in a delictual product liability claim against a manufacturer is whether there was intermediate examination by a subsequent party in the supply chain after leaving the control of the manufacturer. For instance, if a packaged product leaves the premises of a manufacturer and the distributor or retailer opens the packaging before supplying it to a consumer, the manufacturer may seek to argue that there is a possibility of tampering with the product after leaving its control and before use by the plaintiff. A manufacturer may also seek to argue that intermediate inspection was required by a distributor or retailer and that such an inspection was either not done or not adequately done, thereby failing to detect any flaws. This would of course be subject to the product having a flaw that is visually detectable and not a latent manufacturing defect.

For purposes of strict liability under section 61, an argument by a producer that there was inadequate intermediate inspection by a distributor or retailer would arguably not absolve the producer from liability. However, it may provide the producer with scope to argue that the court ought to apportion responsibility for the harm in a way which reflects the failure by that distributor or retailer, pursuant to section 61(6)(c).

In the case of design defects, the plaintiff would need to establish the defective character of the product and that this character was the cause of the alleged harm. In determining whether a design defect exists, relevant considerations may include the existence of a feasible alternative design, the risk presented by the product and the cost of reducing those risks having regard to price and utility of the product.[1089] Causation may, therefore, involve establishing not only that the product was defective in design, but also that

[1089] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-6.

implementation of a feasible alternative design would have significantly reduced the risk of harm.[1090]

In the context of instructional or warning defects, the plaintiff would need to establish a causal link between the harm suffered and the lack of adequate instructions or warnings, which has rendered the product defective. This requires the plaintiff to prove: proper instructions or warnings could have been provided, the instructions or warning would have been observed by the consumer, and finally, that adherence to the instruction or warning would have prevented or reduced the risk of harm.[1091] The second element of this enquiry is problematic in that consumer responses to instructions or warnings will inevitably vary.

In order to determine the consumer's hypothetical response and to balance the respective expectations of the manufacturer and the consumer, it is suggested that two rebuttable inferences may be drawn from the statutory wording[1092]: Firstly, where a warning is given, the seller may reasonably assume it will be read and heeded.[1093] Secondly, if no warning has been provided, it may be assumed that a warning, had it been present, would have been read and heeded. Loubser & Reid point out that courts should apply these rebuttable presumptions having regard to the likely consumers of the product.[1094] For instance, if a product contains instructions in complicated technical language and that product is

1090 Ibid.
1091 At 61-6, citing Bowbeer, Lumish & Cohen 'Warning! Failure to read this article may be hazardous to your failure to warn defence' 2000 *Wm Mitchell L Rev* at 444.
1092 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at At 61-7, citing Miller & Goldberg *Product Liability* 2 ed (2004) at 474 - 475.
1093 This presumption is derived from comment (j) to Section 204A of the US *Restatement (Second) of Torts*.
1094 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-7.

marketed in rural areas where literacy levels vary, these presumptions may be rebutted.[1095]

Legal causation may play an important role in limiting section 61 liability, particularly in the context of pure economic loss arising from injury or property damage under section 61(5), which could be much greater than the physical effects of a product defect.[1096] Legal causation would require courts to make a value judgment to assess whether it is reasonable to impute harm to the defendant, having regard to the proximity between the wrongdoer's conduct and the harm as well as policy considerations based on reasonableness, fairness and justice.[1097]

In conclusion, the general principles of causation as developed in the common law of delict, are likely to be applied by South African courts in determining section 61-liability. The question of causation in the context of a section 61 claim has unfortunately not yet been subject to proper judicial consideration. In light of the prevailing practice in foreign jurisdictions where an inference of defectiveness is drawn in appropriate cases, South African courts may follow a similar approach and allow for an inference that goods contained a 'defect', 'hazard' or 'unsafe' characteristic, akin to the *res ipsa loquitur rule* at common law, where the circumstances of the harm-causing incident warrant this. However, as noted above, South African courts have been reluctant to apply this doctrine in delictual claims and has to date not applied the doctrine in a product liability case under the Aquilian action. It would certainly be in the spirit of protecting vulnerable consumers to

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1095 Ibid.
1096 61-8.
1097 *S v Mokgethi* 1990 (1) SA 32 (A) 40-41; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) paras [38]-[41], [46]-[53], [68]-[74].

allow for such a doctrine to assist plaintiffs in establishing factual causation where the facts surrounding the harm-causing incident justify it. The onus would then shift to the defendant to rebut the inference that a product defect caused the harm.

Further, South African courts may seek guidance from English case law applying the UKCPA where it has on numerous occasions been considered what standard of proof is required to establish defectiveness and causaction. If South African courts were to follow the approach in the most recent cases on this point,[1098] then section 61 plaintiffs would merely need to prove the existence of a defect in broad or general terms, such as "*a defect in the electrics of the vehicle*" and a court would simply have to determine that the loss was caused by that defect and not another cause.

4.2.5 Harm and damages

In terms of section 61(6), harm for which a person may be held liable in terms of this section includes:

> *"(a) the death of, or injury to, any natural person;*
>
> *(b) an illness of any natural person;*
>
> *(c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and*
>
> *(d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c)."*

Section 61 provides no further clarification as to how these categories of damages are to be assessed and what heads of damages would be included in each category. It is likely

[1098] *Hufford v Samsung Electronics (UK) Ltd* [2014] EWHC 2956 (TCC); *Ide v ATB Sales* [2008] EWCA Civ 424; [2009] RTR 8.

that the courts will apply the general principles for assessing damages as they have developed under the common law of delict.[1099] Accordingly, section 61 does not appear to extend the scope or damages that may be recoverable under the common law of delict. It is contended that the scope or damages recoverable under section 61 is broader than the scope of damages recoverable by means of a common law claim for breach of contract as pain and suffering damages cannot be recovered under an action for breach of contract but would be recoverable under a Section 61 action.

With respect to "injury to any natural person" under section 61(5)(a), the implication is that this would include harm to the body, pain and suffering, loss of amenities of life, emotional distress and disfigurement.[1100] Economic loss resulting from injury to any natural person for purposes of section 61(5)(d) may include past medical and like expenses such as hospital and doctor expenses, medication, rehabilitation and home care assistance (whether by a family member or professional) and any future medical and like expenses if it is shown there is a 'reasonable possibility' of this being incurred.[1101] Further, economic loss resulting from injury to any natural person may include past loss of income and future loss of earning capacity.[1102] Similar heads of economic loss would be recoverable as a result of 'illness of any natural person' referred to in section 61(5)(b).[1103]

A section 61 claimant can recover economic loss resulting from the death of any natural person,[1104] for instance, a breadwinner or person on whom the claimant was otherwise

[1099] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-23. See also discussion of general principles of harm and damages in the context of the Aquilian action at 2.3.1(a)(ii) above.
[1100] Ibid.
[1101] *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) 785.
[1102] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-23 to 61-24.
[1103] 61-25.
[1104] Section 61(5)a).

financially dependent. The claimant would need to establish that he or she suffered patrimonial loss, having taken into account losses and benefits (for instance, inheritances).[1105]

With respect to "loss of or damage to any property" under section 61(5)(c), the general common law principles for quantifying a claim for property damage is to assess the reduction in the market value of the property.[1106] The reduction in market value may be evidenced by the reasonable cost of repair of the damage.[1107] In the case of total destruction of property, the loss may include the reasonable cost of replacement and the cost of hiring a temporary replacement.[1108] The range of economic losses that could result from property damage is extensive. In the context of property used by a business, the economic loss may arise from business interruption and loss of profits.

It is unclear from the wording of section 61(5) whether pure economic loss is recoverable under section 61. Section 61(5) appears to provide a non-exclusive list of types of harm for which a person may be liable by using the word 'includes', but does not specifically list pure economic harm. It is argued that, in light of the consumer protectionist policy underlying the CPA, courts are likely to interpret section 61(5) broadly so as to include any pure economic loss suffered by consumers as a result of defective goods.

Given that the economic consequences of harmful conduct may be so widespread and unpredictable, South African courts have traditionally sought to limit liability for such harm

[1105] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-23, citing Van der Walt & Midgley *Principles of Delict* (2005) 143-166.
[1106] 2.3.1.1(ii).
[1107] Ibid.
[1108] Ibid.

by means of reasonableness "*so as not to stifle initiative and enterprise*."[1109] Section 61(5) does not restrict the extent of economic losses that may be recoverable, which exposes section 61 - defendants to significant liability.

By comparison, the EU Directive[1110] imposes liability for harm caused by death or personal injuries and damage or destruction to property, other than the defective product. The Directive's definition of 'damage' does not include economic loss and leaves this to individual member states' national laws to determine.

The ACL imposes liability on a manufacturer where a product with a safety defect causes personal injury, loss suffered by another person where the product injures or kills a person (for instance, dependants), damage or destruction to other property (of a kind ordinarily acquired for personal, domestic or household use or consumption) or damage or destruction of land, buildings or fixtures (ordinarily acquired for private use).[1111]

The US *Restatement* (*Third*)[1112] similarly imposes liability for harm to the plaintiff's person or the person of another when harm to that other person interferes with an interest of the plaintiff protected by tort law, and harm to the plaintiff's property, other than the defective product itself. The inclusion of harm to the person of someone other than the plaintiff would arguably be for the benefit of dependants or persons who have a duty to support the injured person.

1109 Loubser & Midgley *The Law of Delict in South Africa* (2012) 224.
1110 3.3.1.5.
1111 3.4.1.5.
1112 3.2.1.5.

Section 61(5) appears to be substantially consistent with the European, Australian and American position in relation to the type of harm for which strict liability is imposed.[1113] The main difference lies in the fact that the CPA does not appear to exclude strict liability for harm to the defective goods themselves. The reason for this exclusion in foreign jurisdictions is that the remedy for harm to the defective good itself is the concern of contract law. Section 61(5)(c) imposes liability for *"any loss of, or physical damage to any property, irrespective of whether it is movable or immovable*." The plain, ordinary meaning of the words "any property" could arguably be interpreted as including damage to the defective product itself and any economic loss resulting from its replacement.[1114]

If, however, the words "any property" are ambiguous in this respect, a purposive interpretation of this provision would arguably dictate that section 61-plaintiffs who stood in a contractual relationship with a supplier be entitled to recover the damage to the product itself by way of a section 61-claim as this interpretation favours consumers, as opposed to requiring such plaintiffs to make out a separate claim for breach of contract or consumer guarantees under section 56 of the CPA. Whilst this interpretation would mean that section 61 provides an overlapping or additional means of obtaining compensation over and above any contractual remedies that may be available to the section 61-plaintiff,[1115] it would arguably promote the welfare of consumers generally, particularly vulnerable consumers, to facilitate recovery of such loss by means of one action. The counter-argument to this would of course be based on legislative context, namely that remedies for loss resulting from damage to a product due to an unsafe feature, defect or substandard quality are already provided in section 56.

[1113] 3.5.5.

[1114] Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) 3 *Stell LR* at 439.

[1115] Loubser & Midgley *The Law of Delict in South Africa* (2012) 251.

In comparison, the ACL only entitles a claimant to recover damages for damage caused by the defective good to other goods.[1116] Similarly, the EU *Directive*[1117] and the US *Restatement (Third)*[1118] explicitly exclude liability for loss resulting from damage to the defective product itself. However, it was recently held by the CJEU in *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and Others*,[1119] that the costs of the removal and replacement of a defective implanted medical device constituted damage caused by a personal injury within the meaning of article 9 of the EU Direcive. The CJEU adopted a broad interpretation of the meaning of "damage", holding that the EU Directive allows for damages that are necessary "*to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect*". Therefore, in the case of the defective implanted medical device, the EU Directive covers damages for the cost of replacement of the defective product and the costs of the replacement surgery. This broad interpretation of "damage" appears to be in conflict with the wording of article 9 of the EU Directive, which expressly excludes the cost of replacement of the defective product itself. It is argued that plaintiffs' lawyers in the EU are likely to rely on this ruling by the CJEU to argue that all losses and expenses relating to the use of a defective product, such as the cost of so-called 'medical monitoring' where a medical device has not yet caused injury but may in the future, are recoverable, regardless of how remote that loss may be.[1120] Recovery of medical monitoring expenses may also be possible in cases involving a defective pharmaceutical product, where a rare side effect related to it may only manifest many years after use.[1121]

1116 3.4.1.5.
1117 3.3.1.5.
1118 3.2.1.3.
1119 Joined cases C-503/13 and C-504/13 (5 March 2015), discussed at 3.3.1.6 above.
1120 Dodds-Smith & Brown 'Recent Developments in European Product Liability' (2016) *International Comparative Legal Guides* at 2.
1121 Ibid.

In the interest of legal certainty, it would be preferable for the South African legislature to clarify this point by expressly stating in section 61(5)(c) whether "*physical damage to any property*" includes damage to the defective goods themselves.

With respect to assessment of damages, section 61(6)(b) provides that nothing in section 61 limits the authority of the court to "*determine the extent and monetary value of any damages, including economic loss*." Loubser & Reid argue that this paragraph indicates the general principles for assessing damages as developed under the common law of delict, will apply to section 61 damages.[1122] In light of section 2(10) of the the CPA and the interpretive presumption that legislation does not intend to affect the existing common law, this view is supported. Further, it would be in the interest of legal certainty to interpret the CPA in a manner that remains as consistent as possible with the existing common law framework for product liability. The general principles for assessment of delictual damages are discussed above.[1123]

Section 61(6)(a) provides that nothing limits the court's authority to assess whether any harm has been proven and adequately mitigated. This appears to suggest that courts may apply the common law mitigation rule, namely that plaintiffs must take reasonable steps to mitigate the harm caused by the defective goods, either by limiting the initial loss or further accumulation of loss.[1124] At common law, a plaintiff cannot recover damages for harm that arose due to an act or omission of the plaintiff rather than the defective goods.[1125] While a

[1122] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at at 61-27.
[1123] 2.3.1.1(ii).
[1124] Ibid.
[1125] Loubser & Reid at 61-27 citing: *Da Silva v Coutinho* 1971 (3) SA 123 (A) 145; *Burger v Union National South British Insurance* Co 1975 (4) SA 72 (W) 74-75.

plaintiff is entitled to recover costs incurred in taking steps to mitigate the harm, the plaintiff should take the less expensive method of mitigating the harm.[1126]

Finally, section 61(c) empowers the court to apportion liability among persons who are found to be jointly and severally liable. This appears to be similar to the court's power to apportion liability among joint wrongdoers in an Aquilian action. This provision is discussed in further detail below.[1127]

4.2.6 Concept of Defectiveness

4.2.6.1 Categories of Product Deficiencies

Section 61(1) imposes strict liability where one of three main categories of defectiveness in a product has been the sole or partial cause of harm. These categories include:

> *"61(1) (a) supplying any unsafe goods;*
>
> *(b) a product failure, defect or hazard in any goods; or*
>
> *(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,"*

Section 61 is to be read with section 53(1), which defines the concepts 'defect', 'failure', 'hazard' and 'unsafe' as they apply to any goods, component of any goods or services under Part H[1128] of the Act. These concepts, and their definitions in section 53, give rise to

[1126] *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) 784.
[1127] 4.2.7.4.
[1128] Chapter 2: Fundamental Consumer Rights, Part H: Right to Fair Value, Good Quality and Safety.

many questions of interpretation and legal uncertainty due to vagueness and overlapping as discussed below.

(i) 'Defect'

The CPA provides in section 53(1)(a) a two-pronged definition of "defect" and employs an expectations test, which resembles the so-called 'consumer expectations test' contained in the EU Directive[1129] and the ACL.[1130] Section 53(1)(a) defines "defect" as:

> *"(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or*
>
> *(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;"*

The plain meaning of the words defining "defect" clearly includes manufacturing defects and defects in components. However, the definition is silent on whether design defects are included. It may be possible to argue that the words "any characteristic" in the second definition of "defect" is broad enough on its plain meaning to refer to design characteristics, and therefore, design defects. This interpretation is further supported if one considers that legislature has provided separately for manufacturing defects in paragraph (i), thereby implying that paragraph (ii) relates to other types of defects unrelate to manufacturing, such as design defects. In any event, there appears to be no logical reason why design defects would be excluded from the definition of "defect". However, it would perhaps have

[1129] 3.3.1.6.
[1130] 3.4.1.6.

been preferable for the legislature to expressly include the word "design" in the formulation of paragraph (ii) in the interest of legal certainty. For example, paragraph (ii) could have read: "*any characteristic of the goods or components, including the design of the goods*…" Van Heerden also supports the view that design defects ought to be expressly included in the definition of 'defect.'[1131]

With respect to manufacturing defects in paragraph (i), it is not clear when an imperfection will be considered "material" and therefore "less acceptable", but this will arguably require consideration of the manufacturer's own standards for those products, particularly as regards the characteristics which make them useful or valuable, and to what extent the product deviates from the particular product line norm in one of those respects.[1132]

It is noted that a "material imperfection" in a good may also have the potential to render the good "unsafe" or "hazardous" as defined separately in section 53. Also, it is not clear whether "less acceptable" should be understood to mean that the manufacturing defect has rendered the product "less useful or practicable", or whether it could also relate to safety of the good. Indeed, when compared to the words "less useful, practicable or safe" in section 53(1)(a)(ii), it is not certain what "less acceptable" would cover and whether the standards differ in any way. If a product is "less useful, practicable or safe than a person generally would reasonably be entitled to expect", arguably those persons may also regard that product as "less acceptable". Moreover, products that "fail" in their intended function, or pose an "extreme risk" would arguably also qualify as "less acceptable". There seems to

[1131] *Product Liability Notes* at 4, cited in Strydom *A Critical Analysis of Strict Product Liability in South Africa (2012)*.

[1132] Loubser & Reid *Section 53* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 53-2.

be no way to rationalise these terminological variances and it creates considerable confusion.

In the recent decision of the High Court in *Halstead-Cleak v Eskom Holdings Limited,*[1133] which is discussed in detail below,[1134] the court held that Eskom was liable as 'producer' and 'distributor' of electricity under section 61 for conducting electricity via a low-hanging line across a footpath, in circumstances which constitute a 'defect' within the meaning of both section 53(1)(a)(i) and (ii). Unfortunately, the judgment does not provide any analysis of the two definitions of 'defect' to assist in differentiating between them or the respective factors that would be relevant to the test for each type of "defect". On appeal, the SCA[1135] held that the electricity did not contain a "defect", "hazard", "unsafe characteristic" nor was it subject to a "failure". Again, the SCA did not provide any further guidance of substance as to the meaning of these various definitions of defectiveness. Unfortunately, both *Halstead-Cleak* judgments are quite brief in their analysis of the various definitions of defectiveness for purposes of section 61. The judgments do not offer any real assistance in differentiating between the two definitions of "defect" in section 53(1)(a) or the other definitions of 'hazard', 'unsafe' and failure'. The court a quo seemed to suggest that electricity "which is not required or used to supply any other consumer", would always be 'defective goods'. In response to the judgment at first instance, it was argued by Loubser & Reid[1136] that it is not the generation ('manufacture') of the electricity, but rather the manner and place of distribution of the electricity in this case, being along a low-hanging line across a footpath, that rendered the electricity dangerous. Accordingly, the authors argued that the definition of "defect" under section 53(1)(a)(i) did not apply here, but rather section

[1133] [2015] JOL 33332 (GP).
[1134] 4.5.2
[1135] *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150.
[1136] *Section 53* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 53-2.

53(1)(a)(ii) and Eskom was liable, as "distributor" of electricity in a manner and in circumstances which rendered it less safe than persons generally would be reasonably entitled to expect. On appeal, the SCA simply commented, without any elaboration, that the harm in this case cannot be said to be due to the electricity failing or due to a "defect" in it. The court explained that a "failure" of the electricity would be if the electricity was unable to perform in its intended manner, which was not the case here. The author agrees with this position. The electricity had done exactly what it was supposed to do, which is why the plaintiff was harmed. This is arguably a very limited view of electricity - focusing on the electrical current only, whereas the commercial sense of electricity is that of a current being conducted along a line, which in this case presented a significant risk of injury.

Further, the SCA held that there was no defect in the electricity as it did not suffer from a "*material imperfection in the manufacture of it"*. This relates to the first definition of "defect" in section 53(1)(a)(i). The author agrees with this position as there was no evidence that there had been any issue with the generation of the electricity. What is disputed is the SCA's conclusion that the electricity did not have a characteristic that *"rendered it less useful or safe than a person would generally expect in the circumstances*" within the second meaning of "defect" in section 53(1)(a)(ii). As Loubser & Reid argued, the fact that the electricity was being distributed via a low-hanging line, thereby exposing persons to its harmful effects, rendered the electricity less safe than a person would generally expect in the circumstances.

The SCA also held that the electricity did not have a "characteristic" that presented a "significant risk of injury" to any person when the goods are utilised within the definition of

"hazard" in section 53(1)(c)(ii). This conclusion is supported. While the electricity did present a significant risk of injury, that risk was arguably not presented at a time when the electricity was being "utilised", rather when a person accidentally came into contact with the low-hanging power line, as the plaintiff did.

Curiously, the SCA did not seem to refer to the definition of "unsafe" in section 53(1)(d) which includes a "*characteristic*" in the goods that presents "*an extreme risk of personal injury or property damage to the consumer or to other persons."* It would seem clear that high-voltage electricity being conducted via a low-hanging power line would present an "extreme risk of personal injury" if the "consumer" or "other persons" came into contact with it, thereby rendering it "unsafe". Perhaps the SCA chose not to apply this definition as it raises some confusion due to its reference to both "consumer" and "other persons", which would not support the SCA's conclusion that section 61 is only available to "consumers" as defined. It is certainly puzzling that "other persons" form part of the definition of "unsafe", yet such persons do not appear to have a remedy under section 61.[1137] Nevertheless, this definition of "unsafe" could perhaps be read as being available only to section 61 claims brought by "consumers" as it merely defines the "unsafe" characteristic as one that would pose a significant risk to persons, whether the consumer or others.

It is interesting to note, by comparison, that the majority of US courts take the position that electricity does not become a "product" for purposes of strict liability until it is converted to a form for delivery to a consumer and that the supply only occurs once it passes through the consumer's meter. In other words, high-voltage electricity in a distribution line, such as

[1137] 4.2.1.

in the *Halstead-Cleak* scenario, would not be considered a "product" subject to strict liability in the US.

The difficulties presented by the multiple definitions of product defectiveness in section 61 is also illustrated by the decision of the Consumer Goods and Services Ombud (CGSO) in 2014 regarding a consumer complaint involving personal injury allegedly caused by inadequate warnings on a drain cleaner product, which is discussed in detail below at 4.3.1.

The expectations test for "defect", namely what "*persons generally would be reasonably entitled to expect in the circumstances"* is broadly based on the consumer expectations test adopted by the EU Directive[1138], the ACL[1139] and a host of other jurisdictions, including China, Japan, Korea, Brazil, Peru and Quebec. The EU Directive[1140] provides that a product is defective if it "*does not provide the safety which a person is entitled to expect."* Like the EU Directive, the ACL[1141] provides that goods have a "safety defect" if their safety is not such as "*persons generally are entitled to expect*." The tests employed by the EU Directive and ACL do not refer to "consumer" or "consumers", but rather "person" or "persons", which could arguably be interpreted as referring to the public's expectations in general, rather than a particular consumer who was harmed or consumers forming part of the target market of the product, or consumers in general. The CPA's reference to "persons generally" appears to be similar to the wording of this test in these foreign jurisdictions.

[1138] 3.3.1.6.
[1139] 3.4.1.6.
[1140] 3.3.1.6.
[1141] 3.4.1.6.

The expectations test has been subject to significant academic criticism due to its vagueness, circularity and potential to readmit negligence to the test for defectiveness, with Stapleton[1142] frankly branding it as "impenetrable to analysis." She points out that people routinely miscalculate risks and that a legal standard cannot coherently or fairly be based on such a volatile standard.[1143] Indeed, as explained above at 1.3.2, the field of behavioural economics show that there are a number of cognitive biases and heuristics that impact on human decisionmaking, suggesting that consumers or product users systematically make judgement errors and suboptimal decisions when assessing product risks and safety.

Further, Loubser & Reid[1144] point out that the consumer expectations test purports to be an objective, normative standard, but ultimately it involves a value judgment by courts. In the US,[1145] the 'expectations test' has been rejected by a majority of courts in favour of a reasonableness standard, which involves a balancing act closely resembling the traditional negligence enquiry and in which consumer expectations is but one relevant factor. Some US states have supplemented or replaced the consumer expectations test with a 'risk-utility test', involving a balancing of certain objective factors. It is argued that the risk-utility test ultimately comes down to a similar value judgment querying whether the product presented an unreasonable risk to consumers.[1146]

[1142] Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective 2000 (39) *Washburn Law Journal* 376.
[1143] 377. See discussion of this test in the context of the EU Directive at 3.3.1.6.
[1144] Loubser & Reid 'Commentary on the Draft Consumer Protection Bill' *(*2006) 17 *Stell LR* at 428-429.
[1145] See discussion of defectiveness under the US Restatement (Third) at 3.2.1.6.
[1146] Loubser & Reid 'Commentary on the Draft Consumer Protection Bill' 2006 17 Stell LR 426.

It is argued that a reasonableness standard is better suited for design defects than a consumer expectation standard, on the basis that it is conceptually difficult to determine what expectations an ordinary consumer may have with respect to the technical design characteristics of a particular product.[1147] This is particularly so in cases involving products of a complex or technical nature. For this very reason, many US courts have rejected the consumer expectations test as the sole test for defective design.[1148]

In a commentary on the draft Consumer Protection Bill, Loubser & Reid suggested that the CPA's definition of "defect" be amended to move away from a "consumer expectations" test for defectiveness and to provide instead for the assessment of defectiveness and wrongfulness in terms of a general standard of reasonableness assessed with hindsight. The use of a hindsight approach means that the supply chain cannot avoid liability by arguing the defect was not reasonably foreseeable at the time of manufacture or supply.[1149] Van Eeden argues that, while Loubser & Reid's suggestion has considerable merit, the expectations test as formulated in the definition of "defect" has the benefit of utilising language not used in the test for negligence at common law and which is more consistent with the language employed in existing international instruments, namely the EU Directive and the UKCPA.[1150] Nevertheless, having regard to the US experience in the context of design defects, to which Van Eeden does not refer, and what the author considers to be valid academic criticism of an "expectations standard", Loubser & Reid's proposal is supported.

[1147] Ibid.
[1148] 3.2.1.6(iii).
[1149] 428.
[1150] *Consumer Protection Law in South Africa* (2013) 376.

As the wording of the "defect" test currently stands, it could still be argued that what persons generally would be "reasonably" entitled to expect "in the circumstances" points to a reasonableness approach traditionally used in the wrongfulness enquiry, involving an *ex post facto* evaluation of all relevant factors. Neither the EU Directive[1151] nor the ACL[1152] make reference to "reasonable" expectations in their respective formulations of the expectations test. The reason for the omission of the word "reasonable" from the European and Australian definitions is presumably due to criticism that it would reintroduce a negligence element or standard to the enquiry.

What is common to the CPA, EU Directive and ACL is that the test for "defect" requires a court to consider "the circumstances" relevant to the particular case. However, unlike the EU Directive and ACL which list examples of circumstances that are relevant, the CPA provides no further guidance in this regard. It will therefore be in South African courts' discretion as to what circumstances they will take into account and the weight that ought to be attributed to each of them.

The US Restatement departs radically from other jurisdictions and the CPA in relation to its definitions and standards for determining manufacturing, design and warning defects.[1153] In fact, the Restatement (Third) has returned to a reasonableness standard closely resembling negligence for design and warning defects, whereas 'true' strict liability applies in relation to manufacturing defects. The rationale for this is that strict liability is not suitable in the case of design and warning defects, which requires a form of risk-utility balancing.

[1151] 3.3.1.6.
[1152] 3.4.1.6.
[1153] 3.2.1.6 (i) - (iii).

In the context of manufacturing defects, the US Restatement imposes strict liability where it can be shown that a product departed from its intended design, regardless of whether all possible care was taken in producing and marketing the product.[1154] By contrast, the test for determining whether a product has a warning or instruction defect under the US Restatement requires American courts to consider whether the foreseeable risks of harm posed by the product could have been reduced or circumvented by providing reasonable instructions or warnings, the failure of which rendered the product "*not reasonably safe*."[1155] Similarly, in the case of design defects, the US Restatement requires courts to consider whether the foreseeable risks of harm could have been reduced or avoided by the adoption of a reasonable alternative design, the failure of which rendered the product not reasonably safe.[1156] The references to foreseeability and avoidability of harm and reasonableness in both these tests point to traditional concepts used in the negligence enquiry.

The reference to "reasonableness" in section 53(1)(a) of the CPA does not necessarily refer to reasonableness in the sense employed by the US Restatement for purposes of design and warning defects. In order to preserve the 'strictness' of liability under the CPA, Loubser & Reid propose that the test for defectiveness under section 53(1)(a) should in each case be determined by applying the traditional wrongfulness standard used in the common law of delict, i.e. the legal convictions of the community, *boni mores* and general reasonableness. In the absence of a negligence test done with foresight, the general reasonableness involved in the wrongfulness test (assessed with hindsight) would then act

[1154] 3.2.3(i).
[1155] 3.2.3(ii).
[1156] 3.2.3(iii).

as an important filter in determining the existence of liability.[1157] A risk-utility analysis for defectiveness, as an alternative to the consumer expectations test, is considered to be more consistent with the current wrongfulness approach followed by South African courts, involving an investigation, with hindsight, into whether the product was unreasonably dangerous or the instructions or warnings accompanying the product were unreasonably deficient.[1158] The authors argue that the CPA ought to provide a non-exhaustive list of factors for consideration by courts in assessing defectiveness, including:

- the standard intended for the product by the producer;
- standards or duties prescribed by legislation for the product;
- the possible prevention of the harmful effect of the product by an alternative manufacturing process or design;
- the risk, benefit, utility and cost of the product;
- the manner in which, and purposes for which, the product has been marketed;
- the use of any mark, instructions or warnings in relation to the product; and
- what might reasonably be expected to be done with the product, for instance when supplying inherently dangerous goods such as electricity;[1159]
- the time when the product was manufactured or supplied.[1160]

The weight to be attributed to the various factors would be within the courts' discretion. Further, the factors to be considered would also depend on the type of defect that is alleged to have caused to the harm. For instance, the US experience in relation to design defect cases illustrates this point.[1161] In some design cases, courts would adopt a risk-

[1157] Loubser & Reid *Commentary on the Draft Consumer Protection Bill (*2006) 17 *Stell LR* at 421.
[1158] 429.
[1159] See discussion of the *Halstead-Cleak* cases at 4.5.2 below.
[1160] 428-429.
[1161] 3.2.3(iii).

utility approach to assessing defectiveness taking into account the availability of a reasonable alternative design.[1162] By comparison, in cases where the design of a product was so 'manifestly unreasonable' that the product should never have been put into circulation, the existence of a reasonable, safer alternative design is considered irrelevant.[1163]

A test for defectiveness under section 53(i)(a) akin to the delictual wrongfulness enquiry, involving consideration of reasonableness with hindsight would be consistent with the test for "safety defect" as applied in practice in Australia under the ACL. In the author's personal experience practising in product liability claims in the State of Victoria, Australia, the question of whether a product has a "safety defect" can be assessed without having regard to what the manufacturer could have foreseen and prevented, but rather objectively assessing the characteristics of the product, the manner in which it was marketed, the instructions provided with the product and what might generally be expected to be done with the product by consumers in general. The case study discussed below[1164] illustrates how these factors are applied in an objective 'risk-utility' approach, as opposed to focusing on the conduct of the manufacturer at the time of producing the goods.

Australian case law highlights other factors, which are not specifically listed in the ACL, as considerations relevant to determining the existence of a "safety defect". For instance, the role of intermediaries may be relevant in the case of complex products such as prescription pharmaceuticals, where medical professionals and pharmacists are provided with detailed information regarding the product by manufacturers. It has been held by an

[1162] Ibid.
[1163] Ibid.
[1164] 5.5.3.

Australian court that the duty to warn a consumer of harmful side-effects of such products rests with the treating physician, not the manufacturer or distributor.[1165] A similar learned intermediary doctrine has been recognised by a majority of courts in the US, particularly in the context of pharmaceuticals and medical devices.[1166] The application of this factor in South Africa may arguably be different than in developed countries such as America and Australia, given the high levels of poverty and illiteracy among consumers. This defence is based on the presumption that the learned intermediary, whether a treating physician or a pharmacist, would explain the risks of a particular product in clear and understandable terms to the consumer. However, there is the real risk in South Africa that consumers may not always fully comprehend instructions or warnings provided verbally to them, whether due to illiteracy or language barriers. Therefore, it is arguable that manfuacturers of such products owe a higher duty in South Africa to provide instructions and warnings in clear, plain and simple language and cannot escape liability by complete reliance on learned intermediaries.

Further, the recent Australian High Court case of *Robinson Helicopter Company Incorporated v McDermott,*[1167] considered the adequacy of instructions provided by a helicopter manufacturer in a maintenance manual and the extent to which manufacturers can rely on the expertise of qualified maintenance persons in interpreting the instructions. This case indicates that the foreseeable reader of instructions/warnings accompanying a product, whether it be a lay consumer or technically qualified person, is a relevant factor when determining whether a "safety defect" exists. In the South African context, this factor would necessarily have to take into account the high levels of illiteracy in assessing

[1165] *Carey-Hazell v Getz Bros and Co (Aust) Pty Ltd* [2004] FCA 853, discussed at 3.4.1.6 above.
[1166] 3.2.1.6 (ii).
[1167] 3.4.4(i).

whether the particular instructions or warnings accompanying a product is adequate in the circumstances.

Another factor which has been noted as potentially being relevant to considering a "safety defect" in Australia, is the price of the goods.[1168] It is argued that a consumer should not expect that a cheaper product contains any additional or special safety features which may be associated with a more expensive version of the product. Further, safety expectations of a product may also depend on the nature of the product and community knowledge of that product. Again, in the South African context, these factors may be applied differently than in a developed country such as Australia. Given the high levels of poverty and illiteracy, South African consumers are unlikely to be able to assess the varying risks of products of a particular type based on price range as they may have always been forced to purchase products at the lower end of the price range.

An important development in relation to the interpretation of the defectiveness standard under the EU Directive is a decision by the CJEU in In *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and Others.*[1169] For the first time since the EU Directive was enacted, the CJEU provided some guidance as to the definition of defectiveness in article 6 of the EU Directive. The German Supreme Court referred a question to the CJEU as to whether a product (such as an implanted medical device) is defective under article 6 if it forms part of a group of products that have a significantly increased risk of failure, but where a defect has not been identified in each specific product within that group.

[1168] 3.4.1.6.
[1169] Joined Cases C-503/13 and C-504/13, discussed above at 3.3.1.6.

In interpreting article 6, the CJEU referred to the sixth recital in the preamble to the EU Directive, stating that this meant that consumer expectations ought to be assessed "in the abstract" with regard to the expectations of the "public at large".[1170] The CJEU held that, while the notion of "legitimate expectation" is particularly difficult to define, the expected degree of safety must be determined by taking into account various factors, including the intended purpose of the product, the nature of the product and the requirements of the group of users for whom the product is intended.[1171] In other words, while the consumer expectations test is expressed as taking account of the expectations of the public at large, in practice, the test compasses the specific requirements and expectations of the group of users for whom the product is intended.

The CJEU ruled that, where products belonging to the same production series have been shown to have a "*significantly higher than normal risk of failure*", or in which a "*significant number of failures have already occurred*," all products in that production series can be classified as defective for purposes of article 6 without proof that a specific product was defective. The CJEU noted that, on the facts before it, the affected patients were entitled to expect a particularly high level of safety given that these products are implanted devices which can lead to cardiac failure or death if they failed. The CJEU held that this interpretation of article 6 is consistent with the objectives of the EU Directive to ensure a fair apportionment of risks between the injured person and the manufacturer.

In the context of the CPA, it may similarly be argued in the future that, while the definition of "defect" refers to the reasonable expectations of "persons generally" suggesting the expectations of the public at large, South African courts should take into account the

[1170] [29].
[1171] [45].

specific requirements and expectations of the group of users for whom the product is intended.

It could be argued that the fact that section 53(i)(a) of the CPA lists no particular factors that must be taken into account in determining the reasonable expectations of persons generally for purposes of a "defect", provides courts with the necessary latitude to consider a broad range of reasonableness factors, some relating to a risk-utility analysis of the product and some relating to a broader value judgment as to whether it was objectively unreasonable (and therefore wrongful) to put the product into commercial circulation, within the unique context of what South African consumers generally could reasonably expect. While South African courts may draw on foreign case law for guidance as to relevant factors to be considered in the defectiveness enquiry, they should always keep in mind that those factors have crystallised in a foreign society where, for example, consumers generally and industry may be more sophisticated than in a developing country such as South Africa.

(ii) Failure

Pursuant to Section 53(1)(b), a 'failure' means:

> *"…the inability of the goods to perform in the intended manner or to the intended effect";*

The references to "intended manner" or "intended effect" appear to refer to the intention of the producer or manufacturer of those goods. Accordingly, it is argued that the concept of "failure" seems to refer to what is generally known as a "manufacturing defect" product

liability law, being a deviation from what the manufacturer intended for that product.[1172] Where this category of defect is in issue, the test is simply whether the goods fail to meet, or deviate from the producer's own standards. No value judgment is required by the court.

This is consistent with the test to determine manufacturing defects under the US *Restatement*, which refers to departure of a product from an intended design.[1173] By comparison, the EU Directive [1174] and ACL [1175] do not provide a similar test for defectiveness as these regimes do not differentiate between categories of defect, i.e. manufacturing, design and warning defects. In the English case of *A v National Blood Authority,*[1176] the court also rejected the categorisation of types of defects and simply distinguished between standard and non-standard products, defining non-standard products as products that are *'different from the norm which the producer intended for use by the public'.*[1177] However, it is worth noting that this distinction between standard and non-standard products does not appear to have been applied subsequently in English case law.

It should be borne in mind that a product may malfunction for a variety of reasons, including misuse, mishandling, tampering or alteration of the product by product users. It is not necessarily due to a manufacturing or design error that the product is unable to perform as intended by its manufacturer. Evidence by a Section 61-defendant that a product was misused, mishandled, tampered with or otherwise altered after leaving the control and possession of that defendant, which resulted in the malfunction may give rise

1172 See eg. discussion of manufacturing defects in US law at 3.2.1.6(i) above.
1173 3.2.1.6(i).
1174 3.3.1.6.
1175 3.4.1.6.
1176 (2001) 3 All ER 289, discssued at 3.3.1.8(i) above.
1177 3.3.5(i).

to a defence under section 61(4)(b)(i). Loubser & Reid point out that a product may also fail to perform in the manner intended by the producer due to a 'natural impurity' rendering them dangerous, such as a virus in blood products or a pathogen in food products.[1178]

Where a product failure presents "significant" or "extreme" risk, it seems that it would also qualify as "unsafe" or "hazardous" within the meaning of section 53(1)(b)(ii) or 53(1)(d), and could simultaneously attract liability under both section 61(a) and (b). Unfortunately, the High Court and Supreme Court of Appeal in the recent *Halstead-Cleak* cases[1179] which are discussed in detail below,[1180] did not provide any substantial guidance to differentiating between the tests for a "defect", "hazard", "unsafe characteristic" or when a product is subject to a "failure".

(iii) Hazard

Section 53(1)(c) defines a "hazard" as a characteristic that:

> *"(i) has been identified as, or declared to be, a hazard in terms of any other law; or (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised."*

With respect to the first of the two alternate definitions, the reference to "any other law" would include national, provincial and any other subordinate legislation as well as any

[1178] Loubser & Reid *Section 53* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 53-8.
[1179] *Halstead-Cleak v Eskom Holdings Limited* [2015] JOL 33332 (GP); *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150, discussed below at 4.5.2.
[1180] 4.5.2

notices, proclamations or ordinances.[1181] However, it is unclear when a hazard will have been "identified as or declared to be" a hazard for purposes of section 53(1)(c).

The second of the alternate definitions of "hazard" refers to a characteristic presenting a "significant risk" of personal injury or damage to property. This characteristic could arguably relate to the manufacturing, design, quality or functionality of the product.

The provision provides no guidance as to how courts are meant to assess "significant risk". It is argued that this will require a value judgment by the court, having regard to various factors relevant to a flexible reasonableness enquiry, similar to the reasonableness enquiry courts are likely to follow in applying the expectations test' prescribed for "defect" under section 53(1)(a).[1182]

Arguably, where a product failure presents 'significant' or 'extreme' risk, it seems that it would also qualify as "unsafe' or "hazardous" within the meaning of section 53(1)(b)(ii) or 53(1)(d), and could simultaneously attract liability under both section 61(a) and (b). Unfortunately, the High Court and Supreme Court of Appeal in the recent *Halstead-Cleak* cases[1183] which are discussed in detail below,[1184] did not provide any substantial guidance to differentiating between the tests for a "defect", "hazard", "unsafe characteristic" or when a product is subject to a "failure".

[1181] Loubser & Reid *Section 53* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 53-9.
[1182] 53-10 and discussion of reasonableness and the 'expectations test' at 53-5.
[1183] *Halstead-Cleak v Eskom Holdings Limited* [2015] JOL 33332 (GP); *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150, discussed below at 4.5.2.
[1184] 4.5.2

(iv) Unsafe goods

Pursuant to section 53(1)(d), "unsafe" means that:

> *"due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons."*

This definition raises a number of questions. Firstly, the overlap between the concept of "unsafe", "defect" and "hazard" is confusing and somewhat circular. Arguably, a product that is "unsafe" is also "hazardous" and "defective". Further, it is questioned why the CPA draws a distinction between "hazardous" and "unsafe" products by requiring an "extreme" risk of injury to have been present in the case of an "unsafe: product, but merely a "significant" risk where a "hazardous" product is concerned. It is unclear when a section 61 claimant would ever elect to prove the patently higher standard of "extreme risk" when the claimant would succeed in establishing defectiveness by proving a "significant" risk, i.e. that the product was "hazardous". It is also unclear whether there are any consequences for purposes of section 61 liability where a product posed an "extreme risk" as opposed to a "significant risk". Finally, it is unclear how courts are meant to assess an "extreme risk". It is argued that the extent of the risk of harm posed would need to be assessed on a case by case basis, like the South African courts' approach to the delictual enquiry of wrongfulness.

By comparison, the ACL similarly employs a single concept of defectiveness, referring to a "*safety* defect" as opposed to a "defect" under the CPA.[1185] The factors listed under the test for "safety defect" in the ACL may provide some guidance to South African courts in

[1185] 3.4.1.6.

assessing whether a product was "unsafe" for purposes of section 53(1)(d).[1186] The test for a "safety defect" in section 9(1) of the ACL provides that goods have a safety defect if their safety is not such as "persons generally are entitled to expect", taking into consideration all relevant circumstances, which includes:

> *"(a) the manner in which, and purposes for which, the goods have been marketed; and*
>
> *(b) the packaging of the goods; and*
>
> *(c) the use of marks, instructions or warnings in relation to the goods;*
>
> *(e) what might reasonably be expected to be done with the goods; and*
>
> *(f) the time when the manufacturer supplied the goods."*[1187]

The application of these factors in the South African context may of course be different to the application in Australian case law. For example, the manner in which goods were marketed and the use of marks, instructions or warnings would have to be considered in the context of how South African consumers, particularly vulnerable consumers with low literacy skills or proficiency in a particular language, would interpret such marketing, marks, instructions or warnings. A different level of comprehension might generally be expected of consumers in a developed country such as Australia.

Loubser & Reid[1188] point out that the incorporation of the concepts 'failure', 'defect' or 'hazard into the definition of 'unsafe' in section 53(1)(d) potentially requires multiple further enquiries:

[1186] Ibid.
[1187] Section 9(2).
[1188] Loubser & Reid *Section 53* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 53-10 to 53-11.

- If the ‘extreme risk’ relates to a ‘failure’ in the good, the question will be whether the inability of the goods to perform in the intended manner or to the intended effect created ‘an extreme risk of personal injury or property damage’.
- If the ‘extreme risk’ relates to a ‘defect’ in the good, the question then becomes whether:
  - The goods contain a ‘material imperfection in the manufacture of the goods’ which renders them ‘less acceptable’ than personal would be reasonably entitled to expect; or
  - The goods have ‘any characteristic’ which renders them ‘less useful, practicable or safe’ than persons generally would be reasonably entitled to expect.
- If the ‘extreme risk’ relates to a ‘hazard’ in the good, the question becomes whether:
  - The good contains a characteristic that has been identified as, or declared to be, a hazard by or in terms of any other law; or
  - The goods contain a characteristic that presents a significant risk of personal injury to any person, or damage to property, when the goods are utilized.

If this was the intention of the legislature, the test for “unsafe” is highly convoluted, confusing and unhelpful. In the absence of clear guidelines on how to assess “extreme risk” other than to apply the definitions of “failure”, “defect” and “hazard”, which are unclear themselves, courts may ultimately resort to a general, reasonableness standard similar to the consumer expectations test prescribed for “defect” under section 53(1)(a). In other words, courts may assess what level of safety persons generally are reasonably entitled to expect of the good in question having regard to all the relevant circumstances.

(v) Inadequate warnings or instructions

Pursuant to section 61(1)(c), goods may have a so-called 'informational defect', being that they were accompanied by inadequate instructions or warnings to the consumer pertaining to any "hazard" arising from or associated with the use of the goods. As noted above,[1189] a "hazard" is defined as a characteristic that has been identified as, or declared to be, a hazard in terms of any law, or 'presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised.'[1190]

It is argued that section 61(1)(c) will impose strict liability upon producers, importers, distributors or retailers where the person who has packaged the goods failed to provide instructions or an adequate warning of the risk posed by the product, irrespective of whether the defendants themselves had any direct involvement in the packaging operation.[1191]

Section 61(1)(c) does not provide any guidance in terms of how courts are meant to assess the adequacy of the warnings and instructions. In the absence of any guideline, it is possible that courts may resort to applying a type of reasonableness standard, possibly akin to the consumer expectations standard prescribed for "defect" under section 53(1)(a). However, this test would be problematic in that it is often difficult to determine what persons generally are reasonably entitled to expect in terms of technical information accompanying a product. As Loubser & Midgley[1192] point out:

1189 4.2.6.1(iii).
1190 Section 53(1)(c)(i)-(ii).
1191 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 2014 at 61-4.
1192 *The Law of Delict in South Africa* (2012) 249.

> *"when courts are required to apply such vague standards….there may be an understandable tendency by courts to resort to looking at the general reasonableness of the producer's behaviour."*

Strydom[1193] suggests that section 49(2) of the CPA could provide a workable guideline to determine which risk ought to be covered by warnings, namely risk:

- of an unusual character or nature;
- the presence of which the consumer could not reasonably be expected to be aware of or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
- that could result in serious injury or death.

When determining the adequacy of product instructions or warnings, their layout and position on packaging may be highly relevant.[1194] Another relevant consideration is the obviousness of the danger or risk associated with the product. The less obvious the danger, the more visible the notice ought to be to the consumer.[1195]

It is relevant to note here that section 58 requires that a person packaging any hazardous or unsafe goods to display on the packaging a notice that complies with the requirements

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1193 'A Critical Analysis of Strict Product Liability in South Africa' (2012) at 101.

1194 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-4, citing e.g. the English case of *Worsley v Tambrands* [2000] PIQR P95 that considered the adequacy of a warning leaflet inside a box of tampons, warning consumers of the risk of toxic shock syndrome. The consumer argued that the warning ought to have been printed more prominently on the outside of the box. The court held that the manufacturers had done all that the consumer was 'entitled to expect' in the circumstances. By comparison, in the US case of *Spruill v Boyle-Midway* 308 F 2d 79 (CA Va 1962) the court held a warning as to the potentially lethal consequences of ingesting furniture polish, which was tucked away in a label attached to the back of the bottle, in fine print of only 1/32 inch in height, to be inadequate.

1195 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-4.

set out in section 22 relating to plain language. A discussion of the requirements of section 22 is beyond the scope of this study.[1196]

Other relevant considerations include the severity of the harm which consumers run the risk of suffering and the number of consumers who are exposed to the risk.[1197] For instance, Loubser & Reid[1198] provide the example of a consumer suffering harm in the form of an allergic or other idiosyncratic reaction to a product. In determining whether the absence of a warning regarding the potential allergic reaction rendered the product unsafe, it should be considered whether a significant number of consumers would be at risk of such a reaction or whether the plaintiff alone was at risk, as well as the severity of the allergic reaction, i.e. whether it is potentially fatal. Instructions for use or warnings should address the reasonably foreseeable uses to which the product is likely to be put and it is argued that a pragmatic approach should be followed here.[1199] A manufacturer or other supplier cannot be expected to provide instructions or warnings for every possible use, or potential abuse, to which a consumer might put the product. The authors[1200] cite the example of a consumer who bathes his pet and places it in a microwave oven to dry. This use may not be reasonably foreseeable by the supplier(s) of the microwave. However, the supplier arguably would be required to warn consumers of the risk of cooking food in metallic containers in the microwave.

1196 See discussion by Van Zyl *Section 58* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 58-

1197 Ibid.

1198 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-5.

1199 Ibid.

1200 Ibid.

In 2014, the CGSO considered, inter alia, section 61(1)(c) in the context of a consumer complaint regarding alleged inadequate warnings or instructions accompanying a drain cleaner product which resulted in personal injury. This case is discussed in detail below.[1201] The findings of the CGSO highlight the difficulty presented by the numerous, alternate definitions of product defectiveness contained in section 61(1). For instance, a product, particularly an inherently hazardous product, which is not accompanied by sufficient warnings or instructions in plain, clear language, may simultaneously be 'unsafe' goods, or have a 'defect' or hazard'. Further, the case highlights that failure by a consumer to follow the instructions for safe use of a product may provide a *novus actus interveniens* for purposes of causation, thereby relieving the producer of Section 61-liability.

Section 61(1)(c) does not refer to hazards arising from or associated with the "reasonably foreseeable use" of any goods, it simply refers to "*the use of any goods*." This wording, coupled with the underlying consumer protectionist policy of the CPA, arguably imposes a heavy burden on suppliers to warn of all risks that may be associated with any use of the goods. As argued by Loubser & Reid, in the absence of clear guidelines to assess the adequacy of warnings or instructions, courts may revert to a form of reasonableness, involving consideration, amongst other things, of the reasonably foreseeable" uses of the goods. It may however be argued that consideration of "reasonably foreseeable" uses reverts to negligence and that South African courts would tend to steer clear of such language in an effort to distinguish section 61 liability from Aquilian liability. This approach is seen in UK case law where courts have been at pains to distinguish between the two

[1201] 4.3.1..

forms of liability.[1202] Perhaps South African courts would rather consider "reasonably expected" uses in an objective manner having regard to the nature of the product and the group of consumers to which it is marketed, so as to distinguish it from uses that could reasonably have been foreseen by the supplier of the product.

The adequacy of instructions and warnings accompanying a product were considered in the Australian case of *ACCC v Glendale Chemical Products*[1203], the only case brought under Part VA of the former Trade Practices Act where liability was imposed. The case involved a plaintiff who sustained chemical burns while using a drain cleaner (caustic soda). The caustic soda had reacted with hot water within the shower drain, burning the plaintiff's face and eyes. The court considered whether the instructions and warnings accompanying the product adequately warned consumers of the risk of injury if the product comes into contact with hot water in a drain. The court held that the manufacturer was well aware of this risk attendant to pouring the caustic soda down a drain containing hot water and that consumers are entitled to be warned of risks in respect of a use to which goods "*might reasonably be expected to be put."* Therefore, the manufacturer ought to have included a specific warning to this effect. Applying this approach in the South African context, it is arguable that the use to which goods "*might reasonably be expected to be put*" should also take into account the potential misuse of products due to vulnerable consumers with low literacy skills misunderstanding or misinterpreting product instructions or warnings.

[1202] See for instance, discussion of *A v National Blood Authority* (2001) 3 All ER 289 at 3.3.1.8(i) above, where the court held that "avoidability of risk" is not a factor to be considered in determining defectiveness under the UKCPA, so as to distinguish it from negligence.

[1203] 40 I.P.R. 619 (1998) (Austl.Fed.Ct.), discussed at 3.4.1.

Further, the recent Australian High Court case of *Robinson Helicopter Company Incorporated v McDermott,*[1204] which considered the adequacy of instructions provided by a helicopter manufacturer in a maintenance manual, indicates that the foreseeable reader of instructions/warnings accompanying a product, whether it be a lay consumer or technically qualified person, is a relevant factor when determining whether an instructional defect exists in goods. In the South African context, this factor would necessarily have to take into account the high levels of illiteracy in assessing whether the particular instructions or warnings accompanying a product is adequate in the circumstances.

By contrast, the US *Restatement (Third)*[1205] has returned to a reasonableness standard for inadequate warnings or instructions, which closely resembles the test for negligence. Section 2(c) of the Restatement provides that a product:

> *"is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe."*

The Reporters' commentary on section 2(c) of the Restatement states that, as a general rule, the manufacturer or seller's duty to inform or warn about inherent risks accompanying a product arises whenever a reasonably foreseeable consumer or use would consider such risks material in deciding whether to use the product or not. This duty normally does not extend to obvious and generally known risks, as inclusion of warnings about such risks would seldom result in higher levels of product safety and could even lead to consumers disregarding warnings, which may also contain information about non-obvious risks. In

[1204] 3.4.4(i).
[1205] 3.2.1.6(ii).

determining the reasonableness of instructions or warnings, a number of factors are balanced by US courts, including content and comprehensibility, intensity of expression and characteristics of expected user groups.

In determining the correct level of instructions or warnings that should accompany a product, the effects of information overload on consumers' decisionmaking should be borne in mind. The notion of 'cognitive capacity limits' in the field of behavioural economics recognises that persons have limited capacity to process any amount of information in a given time and not all information persons are confronted with will enter their working memory.[1206] According to this concept, if consumers are overwhelmed with instructions accompanying products, the quality of their decision-making may be reduced. Further, consumers may tend to pay less attention to an excessive amount of instructions or warnings accompanying a product. In other words, more instructions or warnings are not always better.

Having regard to the Australia, European and US approach to assessing instruction or warning defects,[1207] it is suggested that South African courts could adopt a flexible reasonableness test, akin to the wrongfulness enquiry at common law, to determining the adequacy of warnings or instructions accompanying goods for purposes of Section 61(1)(c). Assessing the adequacy of warnings or instructions should be done with hindsight taking into account all relevant circumstances including:

- the uses to which the good might reasonably be expected to be put;
- the degree of risk posed by the good and the severity of harm should the risk eventuate;

[1206] See discussion at 1.3.2.
[1207] 3.5.6.

- the obviousness of the risk posed by the good;
- the layout and positioning of instructions or warnings on packaging or otherwise accompanying the good; and
- the content and comprehensibility of instructions or warnings.

4.2.6.2 Utility of categorising product deficiencies

The EU *Directive* contains no formal distinction between different types of product defects, however certain member states[1208] have included categories in their national laws. In *A v National Blood Authority*[1209] the UK High Court rejected the formal distinction between manufacturing and design defects in favour of a distinction between 'non-standard' and 'standard' products.[1210] The ACL also does not categorise different types of product deficiency, simply referring to goods having a "safety defect" if their safety is not such as personals generally are entitled to expect.[1211] By contrast, the US *Restatement*[1212] distinguishes between the three types of product defects generally acknowledged in literature, namely manufacturing, design and warning defects, and imposes strict liability for manufacturing defects and a type of fault-based liability for design and warning defects.[1213] Stapleton[1214] criticises this distinction between different forms of product defects, stating it is '*founded on a dubious reading of history and on an attitude about what*

[1208] E.g. Section 5(3) of the *Italian Decree* 224 of 1988 provides that: "A product shall be considered defective if it does not provide for the safety which is usually provided for by other models or the same type." Article 3(2) of Spanish Law 22/94 of 1994 provides that: "In any case, a product is defective if it does not offer the safety normally offered by models in the same line." Furthermore, in a much-criticised case involving an exploding bottle, the German Federal Court has held that the development risk defence in the Products Liability Directive does not apply to manufacturing errors. Hodges 'The Case of the Exploding Bottle of Water' (1996) 73 *Product Liability International* at 18.

[1209] (2001) 3 All ER 289.

[1210] Micklitz, Stuyck & Terryn *Cases, Materials and Text on Consumer Law* (2010) 462.

[1211] 3.4.1.6.

[1212] 3.2.1.6.

[1213] 3.2.3.

[1214] Stapleton 'Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective' (2000) 39 *Washburn Law Journal* 379-380.

might legitimately outweigh norms of fairness, which can be regarded as both strange and inconsistent."

In South African common law of delict, no separate rules have crystallised in respect of different types of product defects. It is argued that there should be no rigid differentiation between manufacturing, design and warning defects in the CPA as the categories will inevitably overlap, giving rise to legal uncertainty.[1215] The difficulty of the various concepts of defectiveness in section 61 have already been illustrated in the *Halstead-Cleak* cases[1216] and the 2014 CGSO decision regarding the allegedly defective drain cleaner.[1217] However, it is argued that different approaches are likely to be followed by South African courts depending on the type of alleged defect in issue, like the US experience.[1218] For instance, with respect to manufacturing defects, the intended design and performance of comparable product types are likely to carry the most weight, whereas a cost-benefit-utility approach will likely be followed in assessing design or warning defects.

In South African common law of delict, the concept of 'defect' in the context of product liability is linked to the delictual element of wrongfulness, consisting of a legal duty owed by the manufacturer not to expose persons harm by 'putting into circulation potentially harmful things.'[1219] This element involves consideration, in hindsight, of all the relevant

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1215 Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) 3 *Stell LR* 429.

1216 H*alstead-Cleak v Eskom Holdings* Limited [2015] JOL 33332 (GP); *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150, discussed below at 4.3.2.

1217 4.3.1.

1218 Loubser & Reid 'Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique' (2006) 3 *Stell LR* at 429.

1219 *Donoghue v Stevenson* (1932) AC 562, 1932 SC (HL) 31, as cited by the South African Appellate Division in *Herschel v Mrupe* 1954 (3) SA 464 (A) 486F.

circumstances, to determine whether the harm caused by the defendant's product was objectively unreasonable.[1220]

It is the author's view that the classification of different types of product deficiencies in sections 53 and 61 of the CPA serves no real practical purpose and gives rise to significant legal uncertainty and confusion. It is suggested that the various definitions could be replaced with a single concept of "defect" for goods as is done in the EU Directive, the UKCPA and the ACL. However, it is suggested that the 'expectations test' for defectiveness of goods, similar to that employed by these foreign regimes, could be abandoned due to the criticism regarding its circularity and vagueness and potential for readmitting negligence to the enquiry. Instead, this test could be replaced with an objective reasonableness standard for determining defectiveness of goods, similar to the wrongfulness enquiry in the common law of delict.[1221] The reasonableness of a product's safety can be assessed with hindsight having regard to all the relevant circumstances, without reintroducing negligence to the enquiry.

It is suggested that the reasonableness test be expressly supported by a non-exhaustive list of relevant considerations to provide a guideline to courts when assessing defectiveness. The particular weight attaching to each factor will arguably depend on the type of alleged defect in question, which would be at the court's discretion. To this end, section 61(1) could perhaps be amended as follows:

[1220] Boberg *The Law of Delict I* (1984) 269-70.

[1221] As suggested by Loubser & Reid *Commentary on the Draft Consumer Protection Bill (*2006) 17 *Stell LR* at 421.

"61(1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence - of a defect in the goods,

~~(a) supplying any unsafe goods;~~

~~(b) a product failure, defect or hazard in any goods; or~~

~~(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods;~~

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be."

Further, it is suggested that “defect” with respect to goods that are the subject of a section 61-claim could perhaps be defined as follows by the CPA:

"(1) For purposes of Part H, goods have a ‘defect' if they are not reasonably safe.

(2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances, including:

(a) the manner in which, and the purposes for which, they have been marketed; and

(b) the standard intended for the product by the producer;

(c) standards or duties prescribed by legislation for the goods;

(b) their packaging; and

(c) the use of any mark in relation to them; and

(d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and

(e) what might reasonably be expected to be done with or in relation to them; and

(f) the time when the goods were manufactured or supplied;

(g) the possible prevention of the harmful effect of the goods by alternative manufacturing process or design;

(h) the risk, benefit, utility and cost of the goods.

(i) the possible prevention of the harmful effect of the goods by alternative manufacturing process or design;"

From a practical perspective, a single concept of defect, as employed by the ACL and EU Directive, would make it easier and less confusing for consumers to plead their case under section 61 and would provide courts with the necessary freedom to develop principles for determining defectiveness that are suitable to the particular type of alleged defect in question, whether manufacturing, design or warning related or in some cases, a combination.

4.2.7 Defences / Restriction of Liability of the Supply Chain

While a section 61-claimant may succeed in establishing defectiveness and the causal link with the harm suffered, liability will not necessarily follow. A section 61-defendant may invoke one of the following statutory defences:

"61(4) Liability of a particular person in terms of this section does not arise if -

(a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;

(b) the alleged unsafe product characteristic, failure, defect or hazard -

(i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

(ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;

(c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or

(d) the claim for damages is brought more than three years after the -

(i) death or injury of a person contemplated in subsection (5)(a);

(ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or

(iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or

(iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d)."

4.2.7.1 Compliance with public regulation

Pursuant to section 61(4)(a) a defence is available where the unsafe or defective feature of goods is "*wholly attributable to compliance with a public regulation*."

For instance, if a supplier's product complies with legislation aimed at regulating and promoting the safety of certain categories of products, such as the *Foodstuffs, Cosmetics and Disinfectants Act*[1222] or the *Medicines and Related Substances Act*[1223] and such

[1222] 54 of 1972.
[1223] 101 of 1965.

compliance is established to be the sole cause of the product's defectiveness, then section 61 liability would not arise.[1224] Compliance with voluntary standards or codes of practice relating to the product in question would not in itself entitle a supplier to the defence under section 61(4)(a).[1225]

The EU Directive's equivalent of this defence provides a defence to the producer where a product defect is "*due to compliance of the product with mandatory regulations issued by public authorities*."[1226] This defence in the EU Directive is arguably broader than section 61(4)(a) in that it does not specify whether the defect ought to be wholly attributable to compliance with a mandatory regulation. The implication of the Directive's wording would, therefore, be that it is possible for a producer to escape liability where the defect is partly caused by compliance with a mandatory regulation.

The ACL provides a narrower defence than the EU Directive, more consistent with the CPA's version, where the sole reason for the product defect is due to compliance with a mandatory standard.[1227] Further, if a manufacturer succeeds with this defence, the ACL provides that the Commonwealth Government of Australia will be liable to compensate the plaintiff. Where a regulation provides a minimum safety standard and the manufacturer was free to exceed the minimum requirement without sanction, it cannot be argued that compliance with the regulation was the sole cause of the product defect.[1228]

1224 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-10.

1225 Ibid.

1226 3.3.4(i).

1227 3.4.1.7(i).

1228 Parliament of the Commonwealth of Australia. 1991. *Explanatory Memorandum to the Trade Practices Amendment Bill (No 2)* 1991 at par 53. [Online] Available: http://www.austlii.edu.au/au/legis/cth/bill_em/tpab21991266/memo_0.html.

Curiously, the US Restatement does not contain a similar defence.[1229] A study by the American Law Institute in 1991 recommended that courts recognise a 'government standards' or 'regulatory compliance' defence, however, this was not pursued any further and American courts do not appear to have moved in this direction since then.[1230]

This defence is unlikely to be of great practical use in South Africa as regulations are generally aimed at making products safer and would rarely force a manufacturer to produce an unsafe product. This is supported by the apparently limited reliance on this defence in the EU. In 2011 it was reported that the equivalent of this defence contained in article 7(d) of the EU Directive had rarely been raised in case law.[1231]

It is suggested that consideration could be given by the South African legislature to providing Section 61 plaintiffs with a right of recourse, as is done by the ACL,[1232] against the public authority responsible for the regulation where it is established by the defendant supplier that the product was defective solely due to compliance with that regulation under section 61(4)(a). However, there may well be valid policy reasons for the CPA not holding public authorities strictly liable in these circumstances. For instance, the view may be that public authorities should not be strictly liable for issuing product safety standards that do not provide the safest and most comprehensive information available, based on scientific knowledge at the time, given the financial restrictions within which these authorities operate. This policy argument would be particularly relevant in the context of a developing

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1229 3.2.1.7(i).

1230 Hammond, McGarity, Sachs, Shapiro and Wagner 'The Role of Health & Safety Evidence in Regulation and the Civil Justice System: Preserving Protection of the Public' (2014) *CPR Issue Alert* #1401 at 5.

1231 European Commission '*Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999.*

1232 3.4.1.7(i).

country such as South Africa. Further, an allocation of risk argument may dictate that, despite public safety regulations, it is those parties who put into circulation products for profit who should bear the primary and ultimate responsibility for ensuring their safety.

4.2.7.2 Absence of defect at time of supply

Section 61(4)(b)(i) provides a defence if a defendant can show a product defect did not exist in the goods at the time it was supplied by that defendant to another person alleged to be liable. "Supply" for purposes of the CPA includes selling, renting, exchanging and hiring for consideration.[1233] It is not clear from the wording of this provision when exactly the supply is deemed to have occurred. Loubser & Reid [1234] favour a pragmatic interpretation, being that supply occurs when the defendant relinquishes possession or control of the goods. They argue that the purpose of this provision appears to be that a defendant should not be held liable if the defect in goods arose after the goods left that defendant's control, perhaps due to mishandling or incorrect storage by a subsequent supplier, the consumer or another party.[1235]

Section 61(4)(b)(i) appears to be similar to the approach in the EU. The EU Directive provides a defence if it can be shown that it is probable, in light of the circumstances, that the defect did not exist at the time when the producer put the product into circulation or that the defect came into being afterwards.[1236] The equivalent of this defence in the transposing provision under the UKCPA was applied in the case of *Terence Piper v JRI*

[1233] Section 1.
[1234] *Product Liability in South Africa* 132.
[1235] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-10.
[1236] 3.4.1.7(ii).

(Manufacturing) Limited.[1237] In this case, the court had to consider whether a defective hip prosthesis, which fractured after implantation, was defective at the time it was supplied by the manufacturer to the hospital. Based on the manufacturer's evidence regarding its quality control processes and inspections, the Court of Appeal was satisfied that any defect in the surface of the prosthesis would have been identified by the manufacturer prior to delivery, even though there was no proof of inspection of the specific prosthesis that failed. The court held that it was not necessary for the manufacturer to prove the actual cause of the defect and when it arose in order to succeed with this defence.

It is unclear from the wording of section 61(4)(b)(i) of the CPA what level of proof a defendant supplier would have to meet in order to succeed with this defence. In the absence of any legislative clarification in this regard, the onus would arguably rest with defendant to establish, on a balance of probabilities, that the defect did not exist at it time it left that defendant's possession or control. Presumably, if the defendant can adduce sufficient evidence regarding its quality control measures to justify a *prima facie* case that the defect arose after leaving the defendant's possession or control, the onus would then shift to the plaintiff to rebut this. It is doubtful whether a South African court would allow the defence to succeed where the defendant cannot provide proof of inspection of the particular product that allegedly caused harm, as done by the English Court of Appeal in *Terence Piper v JRI (Manufacturing) Limited.*[1238] In the interest of assisting vulnerable consumers in the particular context of South Africa who are often unable to produce the same level of expert evidence as sophisticated manufacturers at trial, South African courts may be inclined to require stricter proof from the defendant as to the absence of a defect in the particular product for purposes of sction 61(4)(b)(i).

[1237] [2006] 92 BMLR 141, discussed at 3.3.1.8(i) aboce.
[1238] [2006] 92 BMLR 141, discussed at 3.3.1.8(i) aboce.

The ACL provides a similar defence where a safety defect did not exist at the time when the goods were supplied by their actual manufacturer. [1239] In the case of electricity under the ACL, the defect must not have existed at the time when the electricity was "generated"; in other words, before it was transmitted or distributed. Further, the ACL provides an express defence to manufacturers of "finished goods" where a defect in a finished good is caused or contributed to by a component.[1240]

While the US Restatement (Third) does not provide for a general defence based on the absence of a defect at the time of supply, it provides an implied defence to this effect. In the case of design and warning defects, it is a defence where the consumer or user misuses, modifies or alters the product. [1241] Further, the US Restatement specifically provides for liability of commercial sellers or distributors of defective product components for harm caused by another product into which that defective component was integrated.[1242]

In practice, section 61(4)(b)(i) of the CPA will arguably provide a defence to the producer or supplier of a component good if that producer or supplier of the component can show that the component was not defective at the time of supply to the manufacturer of the finished product.[1243] For instance, if A manufactures and supplies a component based on (incorrect) technical specifications provided by B, the component in itself is not necessarily defective at the time of supply. It may be that the component only becomes defective when incorporated into the final product produced by B. Arguably, in these circumstances A

[1239] 3.4.1.7(ii).
[1240] 3.4.1.7(ii).
[1241] 3.2.4(iii).
[1242] 3.2.2.
[1243] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-10.

should be able to successfully raise the defence under section 61(4)(b)(i) and B should be liable for a defect in the ultimate complex product, over which the latter had control.

Section 61(4)(b)(ii) of the CPA provides a defence to a person where the unsafe product characteristic, failure, defect or hazard is "*wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person*." The wording of this section is by no means a model of drafting clarity. However, the plain meaning of the wording would appear to cover the scenario where a supplier (A) provided goods to another person (B) together with instructions, for instance in relation to maintenance, storage or use. Where the unsafe characteristic, failure, defect or hazard arises solely due to compliance with A's instructions, this subsection provides B with a defence and precludes A from raising the defence in section 61(4)(b)(i). This defence was arguably introduced as recognition of the reality that retailers are often unfamiliar with the technicalities of certain products and that they should not be held strictly liable for merely following the instructions provided to them by their supplier. In reality, the party providing instructions with a product would in the majority of cases be the producer of that product or, at least, a supplier with more sophisticated knowledge of the product than subsequent suppliers. Section 61(4)(b)(ii) therefore seems to allocate the risk of liability to that party with more sophisticated knowledge of the product as opposed to generalist and/or small, unsophisticated retailers. This defence therefore seems to strike a fair balance between the interests of parties in the supply chain thereby promoting a “fair” and “sustainable” marketplace pursuant to the legislative purposes of the CPA.

4.2.7.3 Defect not reasonably discoverable

Section 61(4)(c) provides that the liability of a "particular person" does not arise if it was "*unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers.*" The circumstances where this defence could be raised may include so-called 'development risks,' being risks that are only discovered as the goods are being used by consumers and which were not be known or detectable at the time of supply.

In comparison, the US Restatement (Third)[1244] does not expressly provide a development risks defence but recognises in commentary to the provision defining "design defects" that a manufacturer may seek to avoid liability for an alleged design defect by arguing that the product conforms to industry practice and incorporates the most advanced or cutting edge technology or scientific knowledge available. It is generally agreed by US courts that conformance of a design with the state of the art is not an absolute defence. In some states, compliance with industry practice is considered to be a relevant factor to determining defectiveness and may create a rebuttable presumption of non-defectiveness. A small number of states allow for an absolute defence based on compliance with industry practice, judging the product design against the state of the art existing either at the time of design or at the time the product was made available on the market.

The ACL[1245] expressly provides for a development risks defence in circumstances where the manufacturer can show the "*state of scientific or technical knowledge*" at the time the goods were supplied did not make it possible to discover the safety defect. Australian case

[1244] 3.2.1.7(iii).
[1245] 3.4.1.7(iii).

law indicates this defence has only been raised successfully once, under the equivalent provision in the former Trade Practices Act.

The EU Directive[1246] similarly provides an express defence to producers where "*the state of scientific and technical knowledge at the time the producer put the product into circulation"* did not allow the defect to be discovered.[1247]

This defence has been subject to extensive academic criticism. For instance, Stapleton[1248] doubts the supposed 'strictness' of liability when it is supported by a 'development risk' type defence: she points out that by allowing the producer or supplier to escape liability on the ground that it acted reasonably, in effect amounts to re-admittance of negligence or fault-based liability. However, industry pressure and policy reasons such as the rise in insurance costs of businesses and inhibition of innovation, have been central to the inclusion of this defence in foreign jurisdictions.[1249] Consumers and businesses would lose out if useful new products are kept off the market because they might pose a development risk. These considerations have outweighed the counter argument that inclusion of the defence would emasculate strict liability and re-introduce elements of fault.[1250] Stapleton is of the view that strict product liability in Australia, which is modelled on the EU Directive with its development risk defence, provides little more exposure to liability than could be generated under a demanding negligence standard. [1251]

1246 3.3.1.7(iii).
1247 3.3.1.7(iii).
1248 'Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective' (2000) 39 *Washburn LJ* 369.
1249 Clark *Product Liability* (1989) 152.
1250 147-148.
1251 'Restatement (Third) of Torts: Product Liability, an Anglo-Australian Perspective' (2000) 39 *Washburn LJ* 369.

The ACL and EU Directive's formulations of this defence differ from the CPA's version in that the ACL and EU Directive's defences are based on *"scientific and technical knowledge"* at the time the producer supplied or put the product into circulation whereas the CPA makes no reference to these words. Interestingly, section 61(4)(c) of the CPA in its final form differs from the formulation in the draft Bill in that *'the state of scientific and technical knowledge at the time the good was under the control of that person"* has been removed as a consideration along with the "*person's role in marketing the goods to consumers*." Section 68(5)(c) of the Draft Consumer Protection Bill 2007 (8 September 2006) provided that:

> *"it is unreasonable to expect the distributor or retail supplier to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to - (i) that person's role in marketing the goods to consumers; and (ii) the state of scientific and technical knowledge at the time the goods were under the control of that person."*

It is argued that the 'development risks' wording used in the EU Directive was removed from the final CPA due to widespread academic criticism that this defence readmits fault-based liability.[1252] However, the omission of these words in the final CPA would arguably make no difference to the ultimate test for this defence, since general reasonableness from a hindsight perspective would in any event require that the state of scientific and technical knowledge at the relevant time be taken into consideration.

It has been held by the CJEU that the reference to "scientific and technical knowledge" in article 7(e) of the EU Directive does not refer to the state of knowledge in the industrial

[1252] Botha & Joubert 'Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability? - A Comparative Analysis' (2011) 74 *THRHR* at 315.

sector within which the producer of the product operates, but rather "*the state of scientific and technical knowledge, including the most advanced level of such knowledge*" in general.[1253] In other words, it is irrelevant to the question of liability under the EU Directive that no-one within the particular class of manufacturer takes the necessary steps to eliminate or prevent a defect, if such steps can be taken based on the available knowledge. Section 7(e) is directed that the objective state of scientific and technical knowledge available, "of which the producer is presumed to have been informed."[1254] However, the CJEU did qualify this by stating that the relevant knowledge must have been accessible at the time the product was put into circulation. The CJEU conceded that the 'accessibility' of knowledge raises difficulties of interpretation, but held this is a matter for national courts to resolve.[1255]

If South African courts were inclined to consider the "scientific knowledge and technical knowledge" as a relevent factor, they would have to consider this in the particular context of distributors and retailers in South Africa and the knowledge reasonably available and accessible to them or that they could reasonably be expected to possess. It is unlikely that courts would expect general distributors and retailers to be aware of the most advanced and latest scientific and technical knowledge reasonably accessible to enable detection of a defect, rather general knowledge that such suppliers could reasonably be expected to possess having regard to their role in marketing the goods. It could perhaps also be relevant to consider whether a retailer is provided with any training or education by a producer regarding the product prior to being able to sell it.

1253 *European Commission v United Kingdom* [1997] All E.R. (EC) 481 at [20]; [26].
1254 [27].
1255 Ibid.

Based on the plain wording of the defence in section 61(4)(c), it therefore appears that section 61 provides a true form of strict liability for manufacturers and importers but a 'modified' strict liability for distributors and retailers who can avail themselves of the section 61(4)(c) defence by showing it was unreasonable in the circumstances to expect them to have discovered the *"unsafe product characteristic, failure, defect or hazard" having regard to their role in marketing the goods to consumers.*[1256]

It is questioned whether the omission of producers and importers from this defence was a legislative oversight given that section 61(4) refers at the outset to the liability of a "particular person". The draft Bill similarly referred only to distributors and retailers in section 61(4)(c). While the plain meaning of subsection 61(4)(c) creates no ambiguity in itself as being limited to distributors and retailers, when read with the words "a particular person" at the start of section 61(4), there is ambiguity, which arguably warrants a purposive interpretation here. It was perhaps the legislature's intention to provide this defence to retailers since they often do not have the opportunity to inspect products prior to on-sale, such as sealed products that would become unmarketable once opened, nor do they necessarily possess the knowledge or skill to detect defects. This would appear to strike a fair balance between the liability of suppliers in the distribution chain where the producer was closer to the product and had the opportunity to conduct proper quality controls prior to packaging. The omission of "importers" from this defence presumably serves to prevent a situation where a plaintiff has no recourse against the retailer and distributor based on this defence and the producer is overseas. In this scenario, fairness would perhaps dictate that the importer of the harmful product into South Africa should

[1256] Van Eeden *Consumer Protection Law in South Africa* (2013) 376.

bear liability towards the plaintiff, regardless of whether that importer could reasonably have detected the defect, in other words true strict liability.

Botha and Joubert[1257] argue that this defence defeats the purpose of true strict product liability as only manufacturers and importers will be strictly liable under section 61. Loubser & Reid[1258] are similarly of the view that this defence has the potential to readmit fault-based Aquilian liability through the back door by using a reasonableness test which judges the conduct of distributors and retailers and *"removes liability for risks which could not reasonably have been anticipated."* Therefore, the authors argue that the reasonableness test for purposes of this defence should be a "*high, although not unattainable standard of reasonableness."*[1259] The conduct of the distributor or retailer should be assessed in light of the "*highest level of good practice in the relevant industry*."[1260] However, the authors caution that, even with such high standards, there are numerous types of defects that "*one could not reasonably expect even a highly responsible distributor or retailer to discover."*[1261]

The reference to retailers' and distributors' "*role in marketing the goods to consumers*" would arguably require courts to consider, for instance, whether they had the opportunity to open packaging and inspect the goods. There are numerous consumer goods that are packaged and sealed in such a way that distributors and retailers are unable to inspect those products for defects prior to on-sale without rendering them unmarketable. Even if

1257 'Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability? - A Comparative Analysis' (2011) 74 *THRHR* at 318.
1258 Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-11.
1259 Ibid.
1260 61-12.
1261 Ibid.

intermediate inspection by these suppliers is possible, it would hardly be practically and economically feasible to require distributors and retailers to do so for every single product they supply. Therefore, the question may be what level of sampling for quality control purposes would be reasonable to expect of a distributor or retailer. There are also products which are of a highly technical or complex nature which means distributors or retailers could not be expected to psosess the knowledge or skill to conduct testing. The question may then become whether they are reasonably expected to outsource to independent testing. As this illustrates, the reasonableness standard would require a balancing of the interests of distributors and retailers and the protection of consumers, having regard to the particular circumstances, such as the nature of the product and the parties involved.

In light of the academic criticism of this defence and in the interest of creating a legal framework for a “fair” and “sustainable” consumer market while protecting vulnerable consumers, it is the author’s view that section 61(4) should not be available to producers and importers, as it has the potential to severely undermine the strictness of section 61 liability. However, its availability to retailers and distributors is supported as it strikes a fair balance between the interests of the supply chain *inter se* and the supply chain vis-à-vis the section 61 plaintiff.

It is unclear what practical impact this defence will have in South Africa or to what extent it will ‘weaken’ the strictness of section 61 liability. It is noteworthy that, since the introduction of this defence in Australia in 1992, it has only been considered twice in

reported case law.[1262] Further, by 2002, the practical application of this defence under the EU Directive was still extremely limited in reported case law despite being available for 17 years.[1263] In 2011 a report by the European Commission on the application of the EU Directive[1264] noted that stakeholders[1265] have differing opinions regarding the effectiveness of this defence, but recognise that the EU Directive overall strikes an appropriate balance between the competing interests of industry and consumers. The report noted that industry and insurance representatives believe removal of the defence would stifle innovation and raise insurance costs. They argue the fact that exclusion removal of this defence has not had any significant impact in Finland or Luxembourg is due to the size of the markets in these member states. On the other hand, consumer representatives are in favour of removing this defence. It remains unclear exactly what practical impact the development risk defence has had to date on strict product liability claims in the EU. However, it is considered important in order to maintain an appropriate balance between producers and persons harmed by defective products and has had a limited economic impact in at least two member states. That much is clear. Of course, the fact that it has not been applied much in EU case law does not mean that the defence has not been raised frequently and successfully in out of court negotiations and settlements.

1262 *Ryan v Great Lakes Council* [1999] FCA 177; *Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd* [2010] FCA 180.

1263 Ibid.

1264 Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999

1265 Member States' national authorities and members of informal advisory groups in the EU.

4.2.7.4 Apportionment of liability

Section 61-liability is joint and several and is imposed on all parties who participate in the retail process, from the producer to the retailer.[1266] Section 61(6)(c) provides that there is no limitation on the authority of the court to apportion liability among *"persons who are found to be jointly and severally liable."* This provision does not elaborate further on the basis for apportionment, perhaps to allow courts to develop rules suitable to section 61 liability.

Since section 61-defendants are jointly and severally liable, they are arguably 'joint wrongdoers' for purposes of the *Apportionment of Damages Act*,[1267] which provides a right of recovery between joint wrongdoers. [1268] However, the difficulty with applying apportionment in strict liability claims is that apportionment is based on the notion of comparative degrees of fault, whereas strict liability is by nature faultless. It is, therefore, unclear whether courts will apply the *Apportionment of Damages Act* for purposes of section 61 liability. To date, courts have not applied this Act in other strict liability actions such as the *actio de pauperie*, rather adopting an all or nothing approach, however, the possibility of applying apportionment in strict liability actions has not been ruled out by courts.[1269]

Further, the plain literal meaning of section 61(6)(c), particularly "*persons who are found to be jointly and severally liable*" does not appear to provide for apportionment in respect of the plaintiff-defendant relationship. The draft provision in the Consumer Protection Bill,

[1266] Section 61(3).
[1267] Act 34 of 1954, s 2.
[1268] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-9.
[1269] *Svamvur v Portwood* 1970 (1) SA 144 (R) 145; *Swart v Honeyborne* 1981 (1) SA 974 (C) 976B.

previously in section 61(7) of the draft Bill mirrors the final version. This omission appears to have been an unfortunate oversight by the legislature. The CPA's purpose of establishing a legal framework for a "fair" and "sustainable" consumer market would dictate that section 61 liabilities should take note of the actions of a plaintiff who recklessly ignores safety warnings or instructions or misuses goods, thereby contributing to their harm and that the defendant's liability be reduced accordingly. If suppliers are held liable for a plaintiff's conduct that contributed to the harm, it would drive suppliers out of the market and reduce consumer access to goods, which would not promote the welfare of consumers generally. However, it is doubtful that courts would stray from the plain meaning of section 61(6)(c) to read it as including apportionment of liability between defendants and the plaintiff. This omission would need to be rectified by the legislature.

By comparison, the EU Directive expressly provides for reduction of damages on the basis of "*the fault of the injured person*." The UKCPA which transposes the EU Directive, expressly provides that, where harm is caused partly by a product defect and partly by the fault of the injured person, the *Law Reform (Contributory Negligence) Act* 1945 and section 5 of the *Fatal Accidents Act* 1976 (contributory negligence) apply as if the defect were the fault of every defendant liable for the harm caused by the defect. This has the effect of deeming the "defect" in the product to be the "fault" of the defendants liable under the UKCPA for harm caused by that defect. This is done to address the theoretical problem of apportioning liability as is done in negligence claims, under a strict liability regime where fault does not feature.

The ACL[1270] provides that, where the loss was caused by both a defect in the goods and an act or omission of the person who suffered loss, the court will reduce the amount of compensation by an appropriate amount, taking all relevant circumstances into account.

The US Restatement (Third)[1271] expressly provides for apportionment of responsibility based on a plaintiff's conduct which "fails to conform to generally applicable rules establishing appropriate standards of care." The rules for apportionment in this regard, and between defendants, are governed by the relevant state laws.

Given the prevailing position in the foreign jurisdictions considered to allow apportionment of responsibility between the parties to a strict product liability action and in the interest of establishing a consumer market that is "fair" and "sustainable" that promotes the welfare of consumers generally, it is the author's view that the section 61 claim ought to allow apportionment of liability having regard to both the plaintiff and defendant(s) contribution to the causation of harm. One solution suggested to the theoretical problem of applying apportionment in a strict liability claim is to assess apportionment on the basis of comparative causation, rather than comparative fault.[1272] In other words, courts would need to objectively assess to what degree the harm was caused by the product defect, the actions of the plaintiff and the actions of the defendant(s). Loubser & Reid point out that there is some authority at common law for apportionment on the basis of comparative causation.[1273] Another solution would be to follow the approach in the UKCPA by expressly stating in Section 61 that the *Apportionment of Damages Act* applies and that

[1270] 3.4.1.7(iv).
[1271] 3.2.1.7(iv).
[1272] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-29.
[1273] Ibid, citing *General Accident Versekeringsmaatskappy SA Bpk v Uijs* 1993 (4) SA 228 (A) 235.

the “defect”, “hazard”, “failure” or “unsafe” characterstic of the goods that caused harm is deemed to be the “fault” of the section 61 defendant(s).

In the interest of removing any legal uncertainty regarding the basis for apportionment and whether apportionment applies with respect to the plaintiff’s contribution to the harm, it is suggested that the CPA should expressly prescribe rules for apportionment or alternatively, expressly state that the rules under the *Apportionment of Damages Act* 34 of 1954 apply to section 61 claims.

4.2.7.5 Prescription

Pursuant to subsection 61(4)(d), liability does not arise if a section 61 claim is brought more than 3 years after-

- the death or injury of a person referred to in subsection (5)(a);
- the earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or
- the earliest time that a person with an interest in property had knowledge of the material facts about loss or damage to that property contemplated in subsection (5)(c); or
- the latest date on which a person suffered economic loss referred to in subsection (5)(d).

Section 61(4) appears to provide for a prescription period in respect of section 61 liability, however it does not use the established terminology contained in the *Prescription Act* 68 of

1969.[1274] It is therefore queried to what extent the prescription provisions under the CPA are intended to co-exist with the *Prescription Act*. Section 16 of the *Prescription Act* states that provisions of the Act shall apply to:

> *"any debt arising after the commencement of this Act'*, save in so far as they are *"inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt.*"

Further, section 11(d) of the *Prescription Act* provides that the general 3-year prescription period applies to all debts not otherwise provided for in section 11 "*save where an Act of Parliament provides otherwise."* The question is therefore whether section 61-liability constitutes a "debt" for purposes of the *Prescription Act*, and if so, whether section 61(4)(d) of the CPA is inconsistent with the *Prescription Act*. Loubser & Reid[1275] identify various interpretation problems or uncertainties arising from the wording of section 61(4)(d) relating, for instance, to the calculation of the time limit, interruption and delay of the running of time and aspects which may indicate inconsistencies between section 61(4)(d) and the Prescription Act. A discussion of these interpretive problems is beyond the scope of this study.

In essence, the authors state that all of these interpretative problems and uncertainties could have been avoided if section 61(4)(d) had simply stated that section 61-liability constitutes a "debt" for purposes of the *Prescription Act*. The authors suggest that section 61(4)(d) be interpreted to reflect this position. Whether such an interpretation is possible

[1274] Loubser & Reid *Section 61* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 61-14.
[1275] Ibid, see discussion at 61-14 to 61-22.

based on the rules of statutory interpretation requires a detailed discussion of the interpretive problems presented by section 61(4)(d), which is beyond the scope of this study. If the interpretation suggested by these authors is not possible, it is suggested that the legislature amend section 61(4)(d) to confirm that section 61 liability constitutes a "debt" for purposes of the *Prescription Act* or alternatively, provide detailed prescription rules for section 61 which addresses the uncertainties identified by these authors.

It is further noted that the CPA does not impose a so-called 'long-stop' provision such as employed by the ACL[1276] and the EU Directive,[1277] which provides that a claim cannot be brought more than 10 years after the supply of the goods by the manufacturer or the time when the product was put into circulation. The reason for this repose period in these jurisdictions presumably relate to concerns over procedural fairness and evidentiary difficulties. A manufacturer is unlikely to retained detailed production or quality control records relating to a product supplied more than 10 years ago. Further, the product may have been subject to considerable use, wear and tear and changed ownership multiple times.

It is unclear whether this was a legislative oversight or whether such a long-stop period was intentionally omitted. The draft version of section 61 in the Consumer Protection Bill made no reference to a long-stop period. In the interest of establishing a legal framework for a "fair" consumer market, procedural fairness and in light of the prevailing practice in the foreign jurisdictions considered, it is suggested that the legislature give consideration to providing for a 'long-stop' prescription period in the CPA for purposes of section 61 claims.

[1276] 3.4.1.7(v).
[1277] 3.3.1.7(v).

4.2.7.6 Contractual restriction of liability

Section 49(1) allows for “consumer agreements” that purport to limit the risk or liability of the supplier or another person, amounts to an assumption of risk or liability by the consumer, imposes a duty on consumers to indemnify suppliers or other persons; or provide for an acknowledgement of facts by the consumer. However, section 49 requires that notice be given to consumers of such terms. Any notice to consumers or a term of a consumer agreement of this nature must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5). In addition, section 49(2) provides that, if a provision or notice concerns any activity or facility that is subject to any risk -

- of an unusual character or nature;
- the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonable be expected to notice or contemplate in the circumstances; or
- that may cause serious injury or death,

then the supplier must "*specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) and (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision*."

Such a provision, condition or notice must be written in plain language, as described in section 22.[1278] Further, the provision or notice must be drawn to the consumer's attention in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer in the circumstances; and before the consumer enters into the transaction or agreement or is required or expected to offer consideration for the transaction or agreement. The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice.[1279]

Section 48(1)(b) prohibits a supplier from marketing, negotiating or entering into a transaction for the supply of goods in a manner that is unfair, unreasonable or unjust. A supplier is also prohibited from requiring a consumer to waive any rights, assume any obligation, or waive any liability of the supplier, on unfair, unreasonable or unjust terms.[1280] Section 48 provides a general description of '*unfair, unjust or unreasonable transactions, agreements, terms or conditions or notices'*, namely if:[1281]

- it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- the terms are so adverse to the consumer as to be inequitable;
- the consumer relied on a false, misleading or deceptive representation, within the meaning of section 41, or an opinion provided by or on behalf of the supplier, to the consumer's detriment; or
- the agreement was subject to a term, condition or a notice contemplated in section 49(1), and the term, condition or notice is unfair, unreasonable, unjust or

[1278] For a detailed discussion of the requirements of plain language, see: Stoop Section 22 in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 22-1 to 22-13
[1279] Section 49(5).
[1280] Section 48(1)(c).
[1281] Section 48(2)(a)-(d).

unconscionable; or that term, condition or notice was not drawn to the consumer's attention in a manner that complies with section 49.

There are varying views in literature as to whether section 61-liability can be contractually excluded, a detailed discussion of which is beyond the scope of this study. However, it is necessary to refer to the main arguments put forth in this regard.

Strydom argues that the supply chain would not be able to exclude section 61 liability altogether as a full exclusion of liability would contravene section 51 and consequently be void.[1282] Section 51 prohibits, *inter alia*, any terms that have the effect of depriving a consumer of a right in terms of the Act, set aside the effect of any provision of the Act or otherwise defeat the purposes and policy of the Act. It is argued that a supplier may, at most, be able to limit the amount of damages it is liable for, but the limitation must not be such as to amount to an unfair contract term in terms of section 48.[1283] Accordingly, so it is argued, it appears the CPA has adopted a balanced approach whereby the supply chain cannot contract out of strict product liability but can limit the extent of liability by means of contractual provisions that meet the requirements of sections 22, 48, 49 and 51.[1284]

The author does not support Strydom's view in relation to liability for death or personal injury. As Naudé[1285] correctly argues, the grey listing of exemption clauses in respect of liability for death and personal injury "*precludes any conceivable argument that section 49(2)(c) permits such exemption clauses and that that provision protects them from a fairness review provided they comply with the formal requirements of that provision."* It is argued that section 49(2)(c) provides a minimum threshold which any provision relating to

[1282] 'A Critical Analysis of Strict Product Liability in South Africa' (2012) at 121.
[1283] Ibid.
[1284] 122.
[1285] *Reg 44* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 44-12.

such risks must comply with, but exemption clauses relating to bodily injury or death are likely to be unfair, regardless of whether they are initialled or signed.[1286]

It is contended that case law preceding the CPA on exemption clauses relating to bodily injury and death remain relevant as the CPA does not affect any consumer rights afforded by common law.[1287] Therefore, the question of whether a clause is "unfair" for purposes of section 48 may set a lower standard than illegality or public policy.[1288] Naudé contends that the grey listing of these clauses will indicate to courts that such clauses would normally be unfair, unless there are good reasons to uphold them. At common law, the point of departure is that the party alleging an indemnity clause is contrary to public policy carried the risk of not being able to establish this.[1289] Case law preceding the CPA provided some indications that a court considering the common law standard of "public policy" might in the future consider all terms limiting or excluding liability for at least death, but possibly also personal injury, to be contrary to public policy due to these clauses infringing the consumer's constitutional rights to life and bodily integrity.[1290]

The effect of grey listing certain exemption clauses is that the onus will rest with the supplier to persuade the court that the term is fair by leading evidence that it has legitimate reasons for limiting or excluding its liability.[1291] Such reasons may relate to the prohibitive cost of insurance, the fact that the goods are inherently dangerous, or there is a high risk of failure which is well known to the consumer, or the goods were produced in accordance

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[1286] Ibid.
[1287] 44-13. Section 2(10).
[1288] *Reg 44* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 44-12.
[1289] 44-13.
[1290] 44-13, citing sections 11 and 12(2) of the Constitution of the Republic of South Africa. See also discussion of case law at 44-13 and 44-15.
[1291] Naudé 'The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2009) *SALJ* at 520-521.

with the consumer's particular specifications.[1292] The consumer's interest should also be taken into consideration to determine the fairness of an exemption clause, particularly in cases where it is realistic to expect the consumer to insure against the loss in question.[1293] Other relevant factors may include the extent of negotiation and whether the consumer was aware of the clause well in advance prior to contracting with the supplier.

It is worth noting that, while the EC Unfair Terms Directive grey-lists exemption clauses relating to bodily injury or death, the majority of EU member states prohibit such exemption clauses.[1294] The EC Proposal on a Common European Sales Law and EC Proposal for Directive on Consumer Rights propose to blacklist these types of exemption clauses.[1295] In comparison, the Australian *Competition and Consumer Act* 2010 simply lists examples of terms that may be unfair, for instance, a term that limits or has the effect of limiting, one party's right to sue another party.[1296]

In light of the grey-listing of contractual exemptions for personal injury and death arising from defective goods, the pre-CPA case law regarding the validity of such clauses, the constitutional rights of the consumer to life and bodily integrity, coupled with the underlying policy of the CPA to advance the welfare of consumers generally, it is unlikely a court will uphold exemption clauses that attempt to limit the supply chain's section 61-liability to the plaintiff for bodily harm or death caused by defective products.

1292 Naudé *Reg 44* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 44-20.
1293 44-21.
1294 44-15 and examples provided at footnote 7.
1295 44-15, citing Article 84(a) of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635 final of 11 October 2011; Annex II to the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COMS (2008) 614 final, submitted on 8 October 2008.
1296 Section 25(k).

With respect to an exemption clause for liability arising out of non-bodily harm caused by a defective product, it is noted that regulation 44 does not expressly grey list a term which purports to exclude or restrict the supply chain's liability for harm other than personal injury or death. Regulation 44(3)(b) does however provide that a term is presumed unfair if it "*has the purpose or effect of excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement…"* Naudé explains that this means all exemption clauses which are not void for purporting to deprive the consumer of his or her rights under the CPA are presumed to be unfair.[1297] An example of an exemption clause which will be void for purporting to exempt the seller from liability under the Act is a clause "*purporting to deprive the buyer of the right to claim damages under Section 61 for bodily injury, death or damage caused to property and resultant economic loss caused by defective goods, insofar as the defences provided for in section 61(4) are not available to the supplier."*[1298]

Naudé argues that the CPA does not provide an express prohibition on exemption clauses in respect of damages claims for loss caused by defects in the goods of which the retailer could not reasonably have been aware and possibly, pure economic loss caused by defective goods,[1299] provided that such loss did not arise as a result of the supplier's gross negligence.[1300] Such exemption clauses would have to comply with the formal requirements in Section 49 and may be voided for being unfair pursuant to section 48. Further, an exemption clause in respect of liability for breach of contract which is not

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1297 *Reg 44* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 44-17.
1298 44-18.
1299 The wording of section 61(5) creates uncertainty as to whether pure economic loss is recoverable under section 61. See discussion at 4.2.2(v).
1300 Naudé *Reg 44* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 44-19.

prohibited will be presumed to be unfair for purposes of section 48 given the grey listing of such clauses in regulation 44(3)(b). An example would be a term providing that a supplier is not responsible for the economic interests of a consumer, thereby purporting to exclude liability for any pure economic loss sustained by the consumer.[1301]

In the author's view, courts are likely to interpret the CPA so as to prohibit exemption clauses in respect of the supply chain's liability to the plaintiff for pure economic loss on the basis that the wording of section 61(5) is broad enough to include pure economic loss. Section 61(5)'s only reference to "economic loss" relates to economic loss that results from death, injury or illness or damage to property and does not expressly include "pure economic loss". However, section 61(5) does not prescribe a *numerus clausus* of types of harm that may be recoverable and is broad enough, on the plain meaning of the wording, to include pure economic loss. Accordingly, allowing exemption clauses for pure economic loss would effectively amount to depriving consumers of a right under the CPA.

As noted above at 4.2.1, it is argued that section 5(5) may extend section 61 liability to the transactions between the parties in the supply chain. For instance, a section 61 claim may potentially be brought by a retailer against a producer relating to the defective goods, loss of profit and to recover compensation for any claims brought against the retailer by the consumer. It is questioned whether this extended section 61 liability could be excluded contractually by parties in the supply chain *inter se*. De Stadler offers a number of arguments in this regard.[1302] Firstly, she contends that, where the transaction is not exempt from the CPA's application, section 51 would prohibit the parties from excluding

[1301] 44-19 to 44-20.
[1302] *Section 5* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 5-41 to 5-42.

any liability under the CPA. The counter argument to this is that section 51 expressly refers to "transaction or agreement". It follows that, if a transaction is exempt from application of the CPA, it is difficult to see how section 51 would apply to it.

De Stadler further argues that, even if section 51 is not applicable to exempted transactions, it is arguable that section 61 in itself prevents exclusion of the liability imposed by it. She bases this argument on the common law requirement of lawfulness for validity of contracts. If a contractual agreement is in direct contradiction to an express or implied prohibition on excluding section 61 liability, there is a presumption that it is void *ab initio*.[1303] Finally, it is suggested that section 61 perhaps implies that its liability cannot be excluded, even in cases where section 51 does not apply to a transaction. According to De Stadler, it is at least arguable that a purpose interpretation of section 61 would not prevent exclusion of its liability in cases where transactions are exempt from application of the CPA, such as transactions involving consumers who are large juristic persons or the State. The basis for this is that the CPA's purpose focuses on the protection of vulnerable consumers, not sophisticated persons with stronger bargaining power. On the other hand, section 5(5) appears to protect the right of retailers to recover losses due to defective goods from distributors, and the right of distributors to recover losses against the producer or importer. It is argued that it would be an unjust position if the retailer did not have a recourse against any party higher in the supply chain who had the most control over the product's safety and quality. This argument is supported in light of the legislative purpose of the CPA to establish a legal framework for a consumer market that is "fair" and "sustainable" and that strikes a fair balance between the parties in the supply chain.

[1303] Ibid, citing *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188 A-B.

By comparison, the EU Directive[1304] expressly provides that the liability of the producer may not, in relation to the injured person, be limited or excluded by a provision limiting its liability or exempting it from liability.[1305] This does not however affect the ability of the producer to limit its liability vis-à-vis subsequent suppliers.

The US Restatement (Third)[1306] similarly provides that "*any disclaimers, waivers or contractual limitations of product sellers or other distributors would not bar or reduce otherwise valid product liability claims for harm caused by new products to persons.*"[1307] The reference to "new products" suggests that contractual limitations for second-hand products may be valid. The US Restatement (Third) does not prohibit the supply chain to limit their liability *inter se*.

The ACL[1308] provides that any consumer guarantees implied by the ACL and any rights and remedies afforded by the ACL cannot be excluded by way of a contractual restriction or exemption clause. In fact, the ACL provides that a person may be subject to prosecution under the Act for attempting to do so. The Australian *Competition and Consumer Act* 2010 simply lists examples of terms that may be unfair, for instance, a term that limits or has the effect of limiting, one party's right to sue another party. In the author's experience, manufacturers and suppliers in Australia would often include a clause in their contracts of sale whereby they exclude all implied warranties and liability, in so far as it is permitted by the ACL and other fair trade legislation. Such a clause may have the effect of excluding common law warranties and liability, however, the manufacturer or supplier would still be bound to comply with the ACL and may still be liable under the ACL for supplying defective

1304 3.3.1.7(vi).
1305 3.3.4(iii).
1306 3.2.1.7(vi).
1307 3.2.4(vi).
1308 3.4.1.7(vi).

goods. The ACL does not prohibit parties in the supply chain to contractually regulate liability *inter se*.

There seems to be general consensus among the foreign jurisdictions considered that contractual clauses that have the effect of restricting or excluding the liability of suppliers of defective products, vis-à-vis the plaintiff, are prohibited or void. There also appears to be consensus that suppliers are generally free in these jurisdictions to contractually agree among themselves who would bear strict product liability in the event that a defective product causes harm.

In conclusion, it appears that any contractual clause that has the effect of restricting or excluding the liability of the supply chain vis-à-vis the section 61 plaintiff for any type of harm envisaged in section 61(5) would be void for purporting to deprive a consumer of a right under the CPA. This would be consistent with the prevailing position in the foreign jurisdictions considered and more importantly, the underlying purpose of the CPA to protect vulnerable consumers who are generally in a much weaker bargaining position in respect of the terms of supply of consumer goods. As noted by the drafters of the US Restatement (Third), there is a presumption that the ordinary consumer lacks adequate information and bargaining power to agree to a fair contractual limitation of rights clause in a contract of sale.[1309]

In the interest of legal certainty for both consumers and industry, it is suggested that the legislature expressly state the position regarding validity of contractual exemption clauses for strict product liability under section 61 in the CPA, particularly whether the supply chain

[1309] 3.2.1.7(vi).

can limit the extent of liability at all, rather than leaving it to the supply chain to interpret and apply the multitude of formal and substantive requirements for fair contract terms.

From a practical perspective, pending further clarification from the legislature or courts regarding the validity of contractual exemption clauses in the context of section 61, it would be prudent for all South African suppliers of goods to revise their standard supply contracts with consumers to ensure conformance, as far as possible, with the requirements of fair contract terms under the CPA. Further, it is suggested that South African suppliers review their business insurance cover and consider obtaining specific product liability insurance.

4.3 SECTION 61 IN PRACTICE

Section 4(1) of the CPA provides that any of the persons listed in subsection 1 may, in the manner provided for in the CPA, approach a court, the National Consumer Tribunal ('NCT') or the National Consumer Commission ('NCC') when that person alleges that a consumer's rights under the CPA have been infringed, impaired or threatened, or that prohibited conduct is occurring. Section 69 provides that any person contemplated in section 4(1) may seek to resolve any dispute with a supplier by either:

- referring the matter directly to the NCT, if permitted by the CPA in the case of the particular dispute;[1310]
- referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of that ombud;[1311]
- if the supplier is not subject to the jurisdiction of a specific ombud:[1312]

[1310] Section 69(a).
[1311] Section 69(b).

- referring the matter to the applicable industry ombud; or
- applying to the consumer court of the province with jurisdiction over the matter if such a court exists and the rules governing that court so permits; or
- referring the matter to another alternative dispute resolution agent contemplated in section 70; or
- filing a complaint with the NCC pursuant to section 71;

- approaching a court with jurisdiction, if all other remedies available to that person under national legislation have been exhausted.[1313]

From a practical perspective, a section 61-plaintiff's access to civil courts is restricted by section 69(d), which provides that a plaintiff may only approach a civil court (other than a consumer court) "*if all other remedies available to that person in terms of national legislation have been exhausted.*" This section suggests that a plaintiff would have to satisfy a civil court that he or she had attempted to obtain redress by way of other remedies, such as alternative dispute resolution and approaching the various entities listed in section 69 "Enforcement of rights by consumer" including the National Consumer Commission, the National Consumer Tribunal, ombuds with jurisdiction and consumer courts.

Section 69(d) creates legal uncertainty and practical problems for plaintiffs. It is unclear from this provision whether a plaintiff would literally be required to exhaust "all other remedies" available under national legislation, which would be very onerous, particularly on vulnerable, impecunious and unsophisticated plaintiffs, and would significantly restrict access to civil courts. A detailed discussion of the implications of section 69(d) for access

[1312] Section 69(c).
[1313] Section 69(d).

to civil courts is beyond the scope of this study.[1314] However, it is clear that this aspect should be clarified by legislature.

4.3.1 Semi-judicial or administrative consideration of Section 61

The NCC, established under section 85 of the CPA, is charged with the role of national regulator of consumer transactions under the auspices of the Department of Trade and Industry.[1315] Part of the NCC's responsibilities include consumer education, research, registering and assessing consumer complaints and establishing institutions to enforce and implement regulatory instruments.[1316] Further, the NCC conducts investigations into trade practices that may be in breach of the CPA and makes recommendations to the Minister for Trade and Industry in this regard.[1317]

The NCC does not have the power to conciliate or adjudicate on disputes between consumers and suppliers; its powers are limited to investigating complaints.[1318] Due to limited resources, it is impossible for the NCC to investigate all complaints received and it therefore refers complaints to alternate dispute resolution agencies[1319] for resolution.[1320]

1314 For a discussion of the problems presented by section 69(d) and the routes to redress implied by section 69, see: Van Heerden *Section 69* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 69-15 to 69-20; Van Eeden Consumer Protection in South Africa (2013) 452 - 454.

1315 http://www.thencc.gov.za/content/about-ncc.

1316 http://www.thencc.gov.co.za/content/overview-national-consumer-commission; Van Heerden *Section 85* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 85-1. The enforcement functions of the NCC are outlined in section 99 of the CPA and include, inter alia, promoting information dispute resolution.

1317 For instance, the recent investigations into the nationwide meat industry which resulted in the Ministry of Trade and Industry issuing new labelling regulations.

1318 http://www.thencc.gov.co.za/content/overview-national-consumer-commission.

1319 For instance, provisional consumer affairs authorities and relevant ombudsman schemes, such as the National Consumer Goods and Services Ombud (CGSO). The NCC is working towards establishing further alternate dispute resolution mechanisms to facilitate quick and efficient resolution of consumer-supplier disputes.

1320 http://www.thencc.gov.co.za/content/overview-national-consumer-commission; http://www.thencc.gov.za/content/about-ncc. The NCC encourages consumers to first approach the

The National Consumer Goods & Services Ombudsman ('CGSO') is an independent non-profit company established in March 2013 and is an accredited dispute resolution agent under the CPA.[1321] The CGSO receives consumer complaints, makes recommendations and where necessary, refers matters to the NCC for further investigation, for instance where prohibited trade practices are suspected. The CGSO issues annual reports regarding the complaints it handles and enforces the Consumer Goods and Services Industry Code of Conduct.[1322] The CGSO is not empowered by the Code to make binding rulings. However, section 3(2)(c) of the CPA provides that, when applying or interpreting provisions of the CPA, a person, court or Tribunal or the NCC may take into consideration any decision of an ombud.

When the CGSO receives a complaint, it will as a point of departure forward the complaint to the relevant supplier as a last opportunity to resolve the complaint directly with the consumer.[1323] If the complaint remains unresolved, the CGSO considers whether to refer the matter to formal mediation or whether to handle the complaint through more informal third party facilitation.[1324] The majority of consumer complaints received by the CGSO are resolved through these processes, with the outcome in the complainant's favour.[1325] The CGSO's processes are informal with no formal pleadings or hearings, and the ombudsman is guided by the law and principles of fairness.

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relevant provincial consumer protection authority in their province or the relevant industry ombud, if a dispute cannot be resolved directly with the supplier.

1321 CGSO Annual Report 2015/16 at 4 [Online] Available: http://www.cgso.org.za/wp-content/uploads/2016/04/CGSO_2015_16_AnnualReportISpreads.pdf?87ab66.

1322 Launched on 29 May 2015.

1323 CGSO Compendium of Cases 2014-2015 at 4. [Online] Available: http://www.cgso.org.za/wp-content/uploads/2015/11/Compendium-of-cases_30_OCT_2015.pdf?87ab66.

1324 Ibid.

1325 Ibid.

In the financial year ended February 2016, the CGSO received 14,599 calls at its call centre with a total of 3,495 cases opened. Of these cases, 43% related to goods.[1326] A compendium of cases publishes by the CGSO for the year 2014-2015 indicates that the majority goods complaints relate to claims for refunds, repair or replacement of goods. Since the CGSO's inception, there have been only two reported decisions regarding personal injury allegedly caused by defective goods where the complainants claimed damages under section 61.

A decision by the CGSO titled "Injury caused by Defective Sandals"[1327] involved a complainant who sustained injury after she fell on the road due to a sandal that was allegedly unsafe to wear on the road. She submitted a claim to the supplier who denied liability as it did not agree there was any quality issue and also given that the shoes showed a fair amount of wear and tear. The complainant sent a claim to the supplier's insurer, who rejected the claim. The insurer refused to provide the complainant with a copy of their investigations. The complainant then referred the matter to the CGSO. In its findings, the CGSO refers to the remedy provided by section 61 of the CPA, noting that consumers:

> *"no longer have the onerous burden of proving fault. A consumer must however still prove that the product had some sort of flaw that made it unsafe or otherwise defective in terms of the definitions set out in the CPA, and the damage was caused wholly or partly by this defect."*[1328]

[1326] CGSO Annual Report 2015/16 at 8 [Online] Available: http://www.cgso.org.za/wp-content/uploads/2016/04/CGSO_2015_16_AnnualReportISpreads.pdf?87ab66.
[1327] (201503-0183) [2015] ZACGSO 3 (18 August 2015).
[1328] Ibid, under heading "Assessment".

The CGSO arranged for the shoes to be returned to the supplier to be inspected and to determine if there are any defects or flaws that caused the complainant to fall. The supplier provided the CGSO with the inspection report completed when they first received the shoes (presumably from the manufacturer/distributor). The report indicated that the necessary quality checks were done before it was sent to various stores. The report also shows that the shoes passed the checks and tests performed on the shoes. The supplier confirmed that there had been no other returns of this particular sandal.

The supplier returned the sandals to its quality department for further inspection. The quality department confirmed there had been considerable wear and tear on the shoes, especially the back of the heel tip and the forepart of the sole bottom, and the moulded grip lines and grip pattern had worn away. This would result in the sandal having reduced grip on wet, smooth surfaces. However, on normal paved, concrete or tar road surfaces, it would still perform its "normal intended purpose".

The CGSO's findings were as follows:

> *"Taking into account that there are various contributory factors that can cause one to fall, it is of paramount importance that we determine with certainty that the shoes were defective and that the defect caused the complainant to fall, before we can instruct the store to take responsibility for the complainant's injury. In this instance, we have not received any proof that the shoes are defective, and the reports returned from the supplier indicate that the shoes do not have any flaws and are not defective. Based on the facts of this case, the information and evidence furnished to this office and on the principles of reasonableness and*

> *fairness, there is no reasonable prospect of this office making a recommendation in the complainant's favour."*[1329]

The CGSO in this case appears to have required a high standard of proof of defectiveness and factual causation, namely "with certainty". It is unclear whether this was with due consideration accepted as a higher standard than "on balance of probabilities." The difficulty in this case is that there was simply no evidence suggestive of defectiveness. There were no competing theories of factual causation, only an allegation of defectiveness without any proof versus proof of considerable wear and tear and evidence by the producer of proper quality controls conducted.

In determining defectiveness, the CGSO did not refer to any specific definition in section 53, simply stating in somewhat informal terms that the complainant had to prove there was "*some sort of flaw that made it unsafe or otherwise defective in terms of the definitions set out in the CPA."* By noting the sandals had been subject to considerable wear and tear which would impair its ability to perform its "*normal intended purpose*" the CGSO were perhaps suggesting that the sandals did not have any characteristic that rendered it "*less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances*" within the meaning of "defect" in section 53(1)(a)(ii)

It also appears that the CGSO will apply general principles of reasonableness and fairness in assessing section 61 complaints. This is perhaps reference to the normative value judgment conducted in the context of wrongfulness (and defectiveness) as to whether liability should arise in a particular case.

1329 At 2.

A further complaint heard by the CGSO in 2014 titled “Burns caused by drain cleaner: warnings adequate” involved a consumer who had sustained serious chemical burns when he spilled drain cleaner (caustic soda) on his foot.[1330] The consumer sought reimbursement for medical expenses and pain and suffering damages from the supplier and distributor. The CGSO considered whether the complainant can establish a claim under any of the causes of action in section 61(1) by assessing the adequacy of warnings on the product. It was found by the CGSO that the consumer's failure to read and heed the warnings by using the product when his feet were unprotected and failure to immediately wash the product off with water was the immediate cause of the injury. The CGSO found that the warnings complied with the prescribed labelling standards and that the consumer is unable to prove a claim against the distributor or the supplier on any of the potential causes of action in section 61(1).

The distributor denied liability, asserting that the labelling provided adequate warnings of the hazards and provided clear instructions as to how to remedy exposure of the product to skin. In particular, the labelling warns that consumers should wear protective gloves and eye protection and, in the event of skin contact, it should be‘immediately washed well with soap and water.

The CGSO considered the relevant provisions of the CPA, in particular sections 22(2), 58(2), 53(1)(c) relating to the meaning of ‘hazard’ and 61(1) as well as the SANS 10234 (2007) regarding hazard symbols, hazard statements and signal words required to be included on labels of hazardous products.

[1330] (20131220550) [2014] ZACGSO (29 April 2014). [Online] Available: http://www.cgso.org.za/wp-content/uploads/2015/11/Compendium-of-cases_30_OCT_2015.pdf?87ab66 at 83 - 90.

In determining whether the warnings accompanying the product were adequate, for purposes of section 61(1)(c), the CGSO considered section 58(2) of the CPA, which requires a person who packages any hazardous or unsafe goods to display on the goods, or within the packaging, a notice that meets the requirements of any other public regulation that is substantially similar to the requirements of section 22, in this case SANS10234 and SANS10265.

The CGSO considered an expert report provided by the distributor and examined photographs of the product's container. The CGSO noted that the pictogram on the container that warns of the corrosive nature of the product is the Globally Harmonized System corrosion symbol, depicted inside a square set at a point. This differs from the requirement in SANS10265 that the pictogram be "in the shape of a square". The CGSO found that all that is required is "*substantial similarity*" to the requirements of section 22 CPA and that the pictogram used is adequate. While the product label only mentions protective gloves and eye protection with no mention of protective footwear the GCSO found that, when this is read with the other warnings regarding the corrosive nature of the product:

> *"it appears self-evident that a reasonable person would understand this to convey the advisability of handling the product with extreme caution and protecting all exposed areas of skin with suitable protective clothing."*[1331]

With respect to the advice on the label regarding treatment in the event that skin is exposed to the product, the CGSO considered the equivalent treatment advice provided by

[1331] (20131220550) [2014] ZACGSO (29 April 2014). [Online] Available: http://www.cgso.org.za/wp-content/uploads/2015/11/Compendium-of-cases_30_OCT_2015.pdf?87ab66 at 88.

the largest manufacturer of caustic soda in the world,[1332] which also advises that "*immediate first aid is required, including flushing the area with running water*…" The distributor's expert opined that the consumer's injuries indicate he did not immediately wash off the caustic soda after exposure. The CGSO noted that it is beyond the scope of its responsibility to make a definitive finding on this point, but did note that the facts point to the "probability" that the consumer did not follow the instructions.

The CGSO found that the absence of advice on the container to seek medical attention in the case of skin exposure did not render the instructions inadequate as it is a matter of common sense to seek medical attention in the event of serious injuries of whatever nature. Further, the GCSO pointed out that, the more information is provided on the label, the smaller the text will become, suggesting that the warnings will be less visible or less likely to be read by consumers. The CGSO therefore concluded that the warnings are, as a whole, adequate, and a claim under section 61(1)(c) would not be successful.

The next question was whether the product was otherwise "unsafe" within the meaning of section 61(1)(a) or contained a "hazard" within the meaning of section 61(1)(b). The CGSO raises concern that these subsections appear to be alternatives to section 61(1)(c) given the use of the word "or" between them, which:

> *"could give rise to an absurd result: that the suppliers of hazardous goods such as petrol, paint stripper, pool acid and pesticides would be liable for all injuries or losses suffered no matter what precautions they took or warnings they gave. This would very soon result in suppliers discontinuing the supply of such products."*

[1332] The Dow Chemical Company.

However, the CGSO considers this problem is addressed to some extent by the fact that a plaintiff would need to establish that the harm was caused "wholly or partly" by the supply of the goods or the hazard. This provides scope for a *novus actus interveniens* argument, in that failure by the consumer to heed the warnings on the product container to wear protective clothing and failure to follow the instructions to rinse skin immediately following exposure, were the immediate causes of the harm, not the hazardous nature of the product. The CGSO cited authority for the view that this *novus actus* by the consumer may relieve the supplier of liability.[1333]

Ultimately the CGSO concluded that the plaintiff is not able to establish a claim against the distributor or the supplier on any of the grounds in section 61(1).

The CGSO's finding highlights the fact that consumers are expected to take reasonable care for their own safety and apply "common sense" when using goods, seemingly measured against the "reasonable person" standard at common law. Therefore, in assessing the defectiveness of a product, the reasonableness of the complainant's conduct, the reasonably expected uses by consumers generally and "common sense" would be relevant factors.

The CGSO's finding further indicates that a relevant factor in the defectiveness enquiry in the context of inadequate warnings or instructions is the consideration that information overload could make instructions or warnings less effective. This links in with the concept of "cognitive capacity limits" of consumers, as identified in the field of behavioural

[1333] http://www.cgso.org.za/wp-content/uploads/2015/11/Compendium-of-cases_30_OCT_2015.pdf?87ab66 at 90, citing Visser & Potgieter 'Law of Damages' 2012 at 226 fn 226.

economics.[1334] Further, the CGSO appears to suggest that the section 22 requirements for labelling need not be complied with in the strictest terms, rather "substantial similarity" is sufficient seemingly to protect industry from an excessive onerous strict liability standard.

The main issue highlighted by the CGSO's finding is the difficulty presented by the numerous alternate and seemingly overlapping definitions of product defectiveness contained in section 61(1). For instance, a product, particularly an inherently hazardous product, which is not accompanied by sufficient warnings or instructions in plain, clear language, may also be "unsafe" goods, or have a "defect" or "hazard". More importantly, the finding highlights that the implications of the word "or" between section 61(1)(a), (b) and (c) raise concerns that suppliers of hazardous, unsafe or defective goods may be held liable for all harm caused by such goods, irrespective of the adequacy of warnings or instructions provided. Such an interpretation and application of these sections would certainly not promote a legal framework for a consumer market that is "fair", "sustainable" or promotes the welfare of consumers generally as it would drive suppliers out of the market or increase the cost of goods, thereby reducing consumer access to goods. It is yet to be seen how courts will approach this potentially unfair result created by the wording of section 61.

One potential solution to this issue an argument that, when courts assess defectiveness in terms of section 61(1)(a) or (b), the general "fairness" and "sustainable" consumer market principles underlying the CPA's purposes would dictate that a product be considered in its entirety, in other words, taking all of its aspects into account. This would necessitate consideration of the adequacy of instructions or warnings accompanying the product,

[1334] Discussed above at 1.3.2.

irrespective of whether section 61(1)(c) is pleaded. Whether such a purposive method of interpretation is justified in circumstances where the definitions of "unsafe", "failure" and "hazard" in section 53 make no express reference to the word "reasonable" (as done in the definition of "defect"), is doubtful. Nevertheless, the CGSO's repeated references to principles of "fairness" and "reasonableness" in this case and the case above dealing with the defective sandals, suggest that courts may in the future seek to interpret section 61(1)(a) to (c) in a way that allows defectiveness to always be assessed, in the final instance, based on general principles of reasonableness and fairness, regardless of what type of defectiveness is pleaded. This would be consistent with the general reasonableness considerations applied in the context of wrongfulness in delictual claims.

4.3.2 Judicial consideration of section 61

The National Consumer Tribunal ('NCT'), which was established under the National Credit Act,[1335] is an independent adjudicative entity that has jurisdiction to hear, *inter alia*, matters arising under the CPA.[1336] A finding by the NCT has the same status as a decision of the High Court of South Africa.[1337] The NCT has the power to make any applicable order contemplated in the CPA or in sections 150 or 151 of the National Credit Act.[1338] The NCT may hear matters referred to it by the NCC after the NCC has completed an investigation into a complaint,[1339] where a complainant has obtained leave from the NCT to refer a matter to it directly after receiving a notice of non-referral by the NCC,[1340] or where a matter has been transferred from a consumer court to the NCT in terms of section

[1335] 34 of 2005.
[1336] http://www.thenct.org.za/mandate. The NCT's initial mandate was to hear matters arising under the National Credit Act, but was later extended to include matters under the CPA.
[1337] Ibid.
[1338] Van Heerden *Section 85* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* 'Commentary on the Consumer Protection Act' (2014) at 75-5.
[1339] Section 73(2), which relates to complaints regarding prohibited conduct.
[1340] Section 75(1)(b), other than a notice of non-referral issued in terms of section 116.

73(3)[1341] or section 75(2)[1342] of the CPA. To date, there have been no reported decisions by the NCT regarding section 61.

To date, there have been only two reported court judgments regarding the application of section 61, namely the High Court and Supreme Court of Appeal judgments in the *Halstead-Cleak* cases, which are discussed in detail below.

In *Halstead-Cleak v Eskom Holdings Ltd*[1343] the plaintiff had sustained severe electrical burns while riding his bicycle when he came into contact with a low-hanging live power line spanning a footpath. It was common causes that Eskom had conducted electricity through the subject power line and was the 'producer' and 'distributor' of the electricity within the meaning of the CPA. The matter proceeded to trial on the limited issue of whether Eskom is strictly liable pursuant to section 61 of the CPA.[1344]

It was argued by Eskom that section 61 does not apply in the present case on the basis that the CPA is concerned with protection of consumers and the plaintiff, in this case, had not been injured as a result of utilising the supply of electricity as a consumer. Further, it was contended that an analysis of the wording of section 61 and section 53 within the

[1341] Section 73(3) provides that, where the NCC refers a matter to a consumer court after issuing a notice of non-referral, any party to that referral may apply to the NCT for an order that the matter be referred to the NCT.

[1342] Section 75(2) provides that, where a matter is referred directly to a consumer court by the complainant after receiving a notice of non-referral from the NCC, the respondent may apply to the NCT for an order that the matter be referred to the NCT and the provisions of section 73(4) apply to such an application. Section 73(4) provides that the NCT must conduct a hearing into any matter referred to it under this Chapter and may make any applicable order contemplated in the CPA or in sections 150 or 151 of the NCA.

[1343] [2015] ZAGPPHC 632.

[1344] The plaintiff's claim in delict and the assessment of quantum were postponed *sine die*.

context of the CPA indicates that section 61, in particular, was not intended to apply to factual scenarios such as this one.[1345]

The High Court considered the wording of section 61 read with the definitions of "defect" contained in section 53 and the definitions of "consumer", "distributor", "goods", "market", "producer", "supplier" and "supply" under the CPA. The court also noted section 25 of the *Electricity Regulation Act*[1346] which provides as follows:

> *"Liability of licensee for damage or injury*
>
> *In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury shall be presumed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary."*

The court noted that the preamble to the CPA recognises that *"it is necessary to develop and employ innovative means to…(b) protect the interests of consumers, to ensure accessible, transparent and efficient redress for consumers who are subject to abuse or exploitation in the market place and (c) to give effect to internationally recognised custom rights*."[1347]

The court noted that various provisions of the CPA provide protection to and redress for "any person", as opposed to only "consumers."[1348] Further, the court stated that section 5(5) provides that sections 60 and 61 are applicable even to transactions that are exempt

[1345] [14].
[1346] 4 of 2006.
[1347] [16].
[1348] [17].

from the provisions of the CPA. On this basis, the court rejected Eskom's argument that an innocent third party, who is not strictly a "consumer" within the definition of the CPA, who suffers loss, such as a dependant of a breadwinner who is killed by a defective product, cannot seek redress under the CPA as this would be "*contrary to the spirit and purpose of the CPA*."[1349]

The High Court then proceeded to consider whether "goods" or "services" as defined under the CPA are involved, if so, the capacity in which Eskom and the plaintiff stand in relation to such "goods" or "services". The court held that the definition of "goods is clearly intended to include "electricity" given that subsection (e) of the definition expressly includes electricity.[1350] The court found that Eskom qualifies as a "producer" of the electricity as it is common cause Eskom generated the electricity for purposes of distribution with the intention, at all times, to supply the electricity in the ordinary course of business.[1351] Further, it was held that Eskom also qualifies as a "retailer" as it supplied the electricity to consumers in general. According to the court, the definitions of "supplier" and "supply" do not require the "consumer" to be the injured party in this case as such an interpretation would be contrary to the spirit and purpose of the CPA.[1352] The court noted that "supplier" means a person who markets any goods or services, with "market", when used as a verb, being defined to mean "*to promote or supply any goods or services*". Further, section 1 defines "supply", when used as a verb in relation to goods, to include selling "*…in the ordinary course of business for consideration"* The court held that these

[1349] [17].
[1350] [19].
[1351] Ibid.
[1352] Ibid.

definitions indicate the CPA is applicable and rejected Eskom's argument to the contrary.[1353]

Further, the High Court held that section 61(5)(a) indicates that liability is not limited to "consumers" as defined in the CPA or consumers generally, but to "any natural person."[1354] Accordingly, it is not a pre-requisite for section 61-liability that the plaintiff be a "consumer" within the contractual sense as defined under the CPA for section 61-liability to arise.[1355]

The next question to be considered was whether the electricity contained a "defect" within the meaning of section 53(1). The court held that electricity conducted along a line which is not required or used to supply any other consumer, qualifies as "*goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances"* as per the definition of "defect" in section 53(1)(a)(i).[1356]Further, the court held that, given the inherent dangerous nature of electricity, by permitting such a danger to exist also qualifies as *"goods or components less…safe than persons generally would be reasonably entitled to expect in the circumstances"* as per the definition of "defect" in section 53(1)(a)(ii).[1357] The court held that Eskom should be liable for these defects on the basis that:

> *"logic accordingly dictates that the defendant cannot introduce a source of danger and thereafter seek exoneration when injury is caused as a result thereof."*[1358]

[1353] Ibid.
[1354] Ibid.
[1355] [19].
[1356] [20].
[1357] [22].
[1358] Ibid.

The court noted that, after Eskom had learned of the incident, it acted immediately by switching off the electricity and having the lines dismantled. Applying the principle used in *Coppejans v Bosman*[1359] the High Court held that Eskom's conduct after the incident "*reinforce the notion that it had introduced the source of danger which led to the plaintiff's injuries for which it would be held liable."*[1360]

The High Court found Eskom to be 100% liable to the plaintiff for the injuries sustained pursuant to section 61.

Comment:

There are numerous difficulties with the High Court's interpretation and application of the section 61 provision.

Admittedly, the words "any natural person" in section 61(5) as opposed to "consumer" in other subsections of section 61 does create ambiguity as to whether section is only available to a "consumer" as defined or any natural person harmed by goods. This ambiguity arguably warrants a purposive interpretation "*in line with the spirit and purpose of the CPA*." The High Court's statement that *"logic accordingly dictates that the defendant cannot introduce a source of danger and thereafter seek exoneration when injury is caused as a result thereof"* is an incredibly oversimplified statement of a much more complex problem. Not all dangerous products that cause harm should give rise to legal

1359 [2014] ZAGPHC 1833, a case involving an *actio de pauperie* for injuries sustained by the plaintiff when the defendant's dog allegedly attacked the plaintiff. While the defendant denied liability on the basis that the dog was a stray dog, the defendant rescued the plaintiff from the attack, took her to hospital and visited her in hospital, paid her medical expenses and eventually put the dog down. The court held that, if the defendant was not responsible, he would not have incurred these expenses.

1360 [23].

liability. In this regard, it is argued that the welfare of consumers generally would not necessarily be promoted by imposing strict liability for harm to "any natural person" caused by defective products. The imposition of strict product liability on "any natural person" may open the floodgates of litigation and impose an excessively onerous burden on industry, thereby stifling innovation and resulting in reduced access to consumer goods. The CPA's purpose of estabslishing a framework for a "sustainable" and "fair" consumer market would perhaps not be served by such a broad scope of section 61 claimants. It may be that the legislature deemed it more appropriate for harm to persons who fall outside the scope of the definition of "consumer", such as dependants of breadwinners harmed by goods and bystanders harmed by goods, to be governed by Aquilian liability, which requires courts to consider whether a duty of care was owed by the defendant in the circumstances. This arguably provides more scope for a balanced, fair outcome than strict liability.

The High Court relies on the fact that various provisions in the CPA provide protection to "any person" as opposed to "consumers" and that section 5(5) subjects even exempt "transactions" to section 60 and 61 as a basis for finding that section 61 is not limited to plaintiffs who are "consumers" within the definition of the CPA. However, the High Court does not appear to attach any weight to the contextual location of section 61 within the CPA, being located under "*Chapter 2: Fundamental Consumer Rights, Part 1: Suppliers' Accountability to Consumers."*

Further, section 5(5) relates to "transactions" that are exempt from the application of the CPA. Only one out of the three categories of "consumer", namely paragraph (b) of the definition, requires there to have been a "transaction" between the consumer and supplier. In other words, section 5(5) would have the effect that, where a consumer under

paragraph (b) entered into a transaction with the supplier for the goods and that transaction is exempt from the application of the CPA, for whatever reason, the goods and the supplier would still be subject to section 61. In other words, there would still have to be a "transaction" between the plaintiff and the supplier for section 61 to apply. Section 5(5) does not have the effect of extending the application of section 61 to situations where there was no "transaction" for the goods and neither of the other categories of "consumer" apply either. In any event, it is argued that, had the legislature intended to extend section 61 to persons other than those falling within the three categories of "consumer", it would have expressly stated this.

In the author's view the High Court's approach to interpretation of section 61, while seemingly aimed at achieving a just outcome for the plaintiff in this instance, may create an undesirable precedent that would not promote the welfare of consumers generally nor promote a "fair" and "sustainable" consumer market.

Eskom subsequently appealed this judgment.[1361] In considering the provisions of the CPA, the Supreme Court of Appeal referred to the principles of statutory interpretation as stated by it in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1362] and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd,*[1363] namely that statutory interpretation is aimed at determining *"the intention of the legislature but considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came*

[1361] *Eskom Holdings Limited v Halstead-Cleak* ZASCA [2016] 150.
[1362] [2012] ZASCA 13; 2012 (4) SA 593 (SCA) par 18.
[1363] [2015] ZASCA 111; 2016 (1) 518 par 27.

into being." Further, courts should prefer a sensible meaning to one that leads to "*insensible or unbusinesslike results*."[1364]

As a point of departure, the SCA referred to the long title of the CPA which states that it is intended to promote a:

> *"fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements…"*[1365]

The SCA further noted that the Green Paper discussion of the CPA indicates that there was a need for protection of a broad range of consumers in South Africa.[1366] In particular, the Green Paper notes that:

> *"Perhaps one of the greatest pitfalls in most consumer protection laws in South Africa, is the absence of a uniform definition of "a consumer". This has resulted in a difficulty for enforcers to accurately identify individuals that the State seeks to protect. Consumers must be defined broadly as individuals who purchase goods and services, and must include third parties who act on behalf of the consumer…"*[1367]

1364 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) par 18.
1365 [10].
1366 [14].
1367 Draft Green Paper on the Consumer Policy Framework, GN 1957, GG 26774 of 9 September 2004 at 25.

The SCA noted that section 2(1) of the CPA directs courts to interpret the CPA in a manner that gives effect to its purpose as outlined in section 3, namely to promote and advance the social and economic welfare of consumers, particularly vulnerable consumers. This legislative purpose is also reflected in the preamble of the CPA.

With respect to application of the CPA, the SCA notes that section 5 provides that section 61 applies to every transaction within South Africa for the supply of goods or services or promotion of goods or servies. In circumstances where goods are supplied to any person in terms of an exempt transaction, section 5(5) provides that those goods and the producer are nevertheless subject to section 61. The SCA referred to the definition of "transaction" in section 1, being an agreement between two or more persons for the supply of goods or services for consideration in the ordinary course of business.[1368]

As to the definition of "consumer" in section 1, namely a person to whom goods are marketed in the ordinary course of the supplier's business, or who has entered into a transaction with a supplier in the ordinary course of the supplier's business, the SCA noted that the definition includes a person who is a user of the goods regardless of whether that person was a party to the transaction for the supply of the goods. In other words, a person who receives the goods as a gift from a "consumer" would also be deemed a "consumer" for purposes of the CPA. The SCA stressed the fact that there must be *"a transaction to which a consumer is a party, or the goods are used by another person consequent on that transaction."*[1369]

[1368] [14].
[1369] [15].

In light of the CPA's legislative purposes, as stated in the Preamble and section 3, coupled with the definitions of "transaction" and "consumer" in section 1, the SCA stated that the "*whole tenor of the Act is to protect consumers*" and that the CPA must be interpreted keeping this in mind.[1370] With respect to section 61 itself, the SCA noted its context within the CPA, namely that it falls within Chapter 2 dealing with "Fundamental Consumer Rights", in particular, Part H which deals with the "*Right to fair value, good quality and safety."*

The SCA took note of the CPA's definitions of "goods", "supply", "market" and "producer" in section 1. "Producer" is defined as a person who generates or otherwise produces the goods within South Africa "*with the intention of making them available for supply in the ordainry course of business."*

The SCA noted that the phrase "ordinary course of business" is not defined by the CPA but has been judicially interpreted in other contexts, for instance, insolvency proceedings. The SCA referred to the case of *Van Zyl & others NNO v Turner & another NNO*,[1371] where it was held that determining whether a disposition was made in the ordinary course of business is an objective test taking into account all the circumstances including the conduct of both parties to the transaction.

Based on all the definitions of concepts relevant to section 61 as well as the wording of section 61, the SCA held that the plaintiff was required to show that the harm resulted, wholly or partly, from Eskom selling electricity which was "unsafe" or had a product

[1370] [16].
[1371] See 4.3 above.

"failure", "defect" or "hazard", in the ordinary course of business for consideration. Given that section 61 is found in Chapter 2 of the CPA which deals with "Fundamental Consumer Rights", the SCA stated it is:

> *"…clear that the harm envisaged in section 61 must be caused to a natural person mentioned in section 61(5)(a) in his or her capacity as a consumer. This is the only businesslike interpretation possible. The reason why reference is made to a 'natural person' is clearly to distinguish it from 'person' which may include a 'juristic person' or a 'consumer' which may also include a 'juristic person'."*

Therefore, the SCA held that the court a quo had erred in finding that the wording of section 61(5) makes it clear that section 61 liability is not limited to claims by "consumers" as defined in section 1 but to "any natural person." The SCA explained that the court a quo had failed to keep in mind that the CPA's purpose is to protect "consumers" and that this requires a supplier and consumer relationship. On the facts of this case, the SCA held that the plaintiff was not a consumer in relation to Eskom on the basis that the plaintiff had not entered into a transaction with Eskom as supplier or producer of electricity in the ordinary course of Eskom's business and further, the plaintiff was not using the electricity, nor was he a recipient or beneficiary of the electricity.[1372]

With respect to section 61(1)(c), which imposes liability for goods with inadequate instructions of any hazard in goods, the SCA notes that it is limited to inadequate instructions provided to a consumer who had entered into a transaction with Eskom. With respect to section 61(1)(b) which imposes liability for a failure, defect or hazard in goods, the SCA simply reiterated that it is clear in the context of the CPA that liability is restricted to a supplier and consumer relationship.

[1372] [22].

While the plaintiff therefore failed in relation to the requirement of a consumer-supplier/producer relationship for application of section 61, the SCA nevertheless went on to comment in very brief terms on the question of whether the electricity in this case was "unsafe" or had a "failure", "hazard" or "defect". The SCA held that the cause of the harm in this case cannot be said to be due to the electricity failing or due to a defect in it. The court explains that a "failure" of the electricity would be if the electricity was unable to perform in its intended manner, which was not the case here. Further, the SCA held that there was no defect in the electricity as it did not suffer from a "*material imperfection in the manufacture of it"* nor did it have a characteristic that *"rendered it less useful or safe than a person would generally expect in the circumstances*". The electricity also did not have a characteristic that presented a significant risk of injury to any person when the goods are utilised within the definition of "hazard". The SCA again noted that the plaintiff was not utilising the electricity. This is arguably a very limited view of electricity - focusing on the electrical current only, whereas the commercial sense of electricity is that of a current being conducted along a line, which in this case presented a significant risk of injury.

The appeal decision has completely overturned the court a quo's interpretation of the CPA with respect to the scope of application of section 61. In light of the author's criticism of the High Court decision above relating to the scope of application of section 61, the SCA's position in this regard is supported. However, the SCA's conclusion regarding the defectiveness of the electricity in this case is not supported.

Unfortunately, both *Halstead-Cleak* judgments are quite brief in their analysis of the various definitions of defectiveness for purposes of section 61. The judgements do not

offer any real assistance in differentiating between the two definitions of "defect" in section 53(1)(a) or the other definitions of 'hazard', 'unsafe' and failure'. The court a quo seemed to suggest that electricity "which is not required or used to supply any other consumer", would always be 'defective goods'. In response to the judgment at first instance, it was argued by Loubser & Reid[1373] that it is not the generation ('manufacture') of the electricity, but rather the manner and place of distribution of the electricity in this case, being along a low-hanging line across a footpath, that rendered the electricity dangerous. Accordingly, the authors argued that the definition of "defect" under section 53(1)(a)(i) did not apply here, but rather section 53(1)(a)(ii) and Eskom was liable, as "distributor" of electricity in a manner and in circumstances which rendered it less safe than persons generally would be reasonably entitled to expect. On appeal, the SCA simply commented, without any elaboration, that the harm in this case cannot be said to be due to the electricity failing or due to a defect in it. The court explained that a "failure" of the electricity would be if the electricity was unable to perform in its intended manner, which was not the case here. The author agrees with this position. The electricity had done exactly what it was supposed to do, which is why the plaintiff was harmed.

Further, the SCA held that there was no defect in the electricity as it did not suffer from a "*material imperfection in the manufacture of it"*. This relates to the first definition of "defect" in section 53(1)(a)(i). The author agrees with this position as there was no evidence that there had been any issue with the generation of the electricity. What is disputed is the SCA's conclusion that the electricity did not have a characteristic that *"rendered it less useful or safe than a person would generally expect in the circumstances*" within the second meaning of "defect" in section 53(1)(a)(ii). As Loubser & Reid argued, the fact that

[1373] *Section 53* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 53-2.

the electricity was being distributed via a low-hanging line, thereby exposing persons to its harmful effects, rendered the electricity less safe than a person would generally expect in the circumstances.

The SCA also held that the electricity did not have a "*characteristic*" that presented a *"significant risk of injury*" to any person when the goods are utilised within the definition of "hazard" in section 53(1)(c)(ii). This conclusion is supported. While the electricity did present a significant risk of injury, that risk was not presented at a time when the electricity was being "utilised", rather when a person accidentally came into contact with the low-hanging power line, as the plaintiff did. For a discussion of "used" or "utilised" in this context, see the discussion at 4.2.2 above.

Curiously, the SCA did not seem to refer to the definition of "unsafe" in section 53(1)(d) which includes a "*characteristic*" in the goods that presents "*an extreme risk of personal injury or property damage to the consumer or to other persons."* It would seem clear that high-voltage electricity being conducted via a low-hanging power line would present an "extreme risk of personal injury" if the "consumer" or "other persons" came into contact with it, thereby rendering it "unsafe". Perhaps the SCA chose not to apply this definition as it raises some confusion due to its reference to both "consumer" and "other persons", which would not support the SCA's conclusion that section 61 is only available to "consumers" as defined. Nevertheless, this definition of "unsafe" could still be read as being available only to section 61 claims brought by "consumers" as it merely defines the "unsafe" characteristic as one that would pose a significant risk to persons, whether the consumer or others.

It is interesting to note, by comparison, that the majority of US courts take the position that electricity does not become a “product” for purposes of strict liability until it is converted to a form for delivery to a consumer and that the supply only occurs once it passes through the consumer’s meter. In other words, high-voltage electricity in a distribution line, such as in the *Halstead-Cleak* scenario, would not be considered a “product” subject to strict liability in the US.

A further interesting comparison to the *Halstead-Cleak* judgments is the approach of the Australian Federal Court in *Cook v Pasminco Ltd.*[1374] In this case, the plaintiffs brought claims in negligence and nuisance and alternatively under sections 75AD and AG of the former *Trade Practices Act* 1974 (Cth) for harm to their health arising from the emission of allegedly noxious fumes from the defendants' industrial plants. It was held that the emissions were not ‘supplied' to the plaintiffs in trade or commerce within the meaning of the TPA.[1375] Relevantly, the court found that a necessary element of the ‘supply' concept is a ‘bilateral and consensual process' or a ‘consensual transaction or dealing' pursuant to which ‘goods' are passed from the defendants to the plaintiffs.

This is in stark contrast to the High Court’s view in *Halstead-Cleak* that the definitions of ‘supplier’ and ‘supply’ under the CPA do not require the ‘consumer’ to be the injured party as such an interpretation would be contrary to the spirit and purpose of the CPA.[1376] However, *Cook v Pasminco* appears consistent with the approach by the South African SCA in *Halstead-Cleak* on the basis that the defective goods ought to have been supplied

[1374] [2000] FCA 677. See discussion at 3.4.3.

[1375] While the TPA imposes liability where an ‘individual suffers injuries', the concept of ‘supply' in relation to goods, is defined by the TPA as ‘supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase' and Australian courts interpret this to mean the goods have to be supplied by the defendant through an activity or transaction which has a ‘trading or commercial character'.

[1376] Ibid.

through a “consensual transaction or dealing,” whether to the plaintiff or another consumer.

Cook v Pasminco is factually distinguishable from *Halstead-Cleak* in that the emissions were a by-product of manufacturing processes and were never intended to be supplied by the defendants in trade or commerce to any consumers. In *Halstead-Cleak*, Eskom did generate electricity with the intention of supplying it to consumers and did supply electricity to consumers in general. Further, *Cook v Pasminco* must also be understood in the particular context of the legislation it applied. Nevertheless, it is useful to note that the Australian equivalent of section 61 of the CPA is only available in cases where the goods were supplied by way a commercial transaction or exchange and an individual was harmed by those goods.

It is contended that, if the CPA was applied to the factual scenario in *Cook v Pasminco*, the defendants would not qualify as ‘retailers’ or ‘distributors’ of the emissions on the basis that the emissions were not goods ‘supplied’ by the defendants ‘in the ordinary course of business’, whether to the plaintiff or consumers in general.

Conversely, if the Australian TPA or ACL were applied to the *Halstead-Cleak* factual scenario, it is doubtful whether Australian courts would find there was a ‘supply’ in the absence of a ‘consensual transaction or dealing’ pursuant to which Eskom conducted the electricity in question. The electricity was not required or used to supply any consumer in this case. It is submitted that, conducting electricity along a low-hanging line across a footpath in these circumstances which causes injury to a member of the public, would

rather fall within the domain of public liability in Australia and a claim would have to be brought by the injured party in negligence.

Although case law regarding section 61 is very limited at this stage, the section 61 action has likely been raised as a matter of course in most claims arising from harm caused by defective products since this remedy came into effect. Further, given the range of informal consumer redress avenues, which are promoted by consumer protection bodies, the steadily increasing number of complaints received by the NCGSO and presumably other industry ombud schemes, as well as the desirability of out of court settlements for cost reasons, it is likely that judicial consideration of section 61 claims by courts will remain limited. This is further supported by the fact that section 69(d) appears to restrict section 61-plaintiffs' access to civil courts (other than a consumer court) until "*all other remedies available to that person in terms of national legislation have been exhausted.*"[1377]

4.3.3 Comparative case study: South Africa / Australia

The following case study offers a practical example of a litigated strict product liability claim in Australia in which the author personally acted for a defendant retailer. The case study demonstrates how strict product liability causes of action are pleaded in the alternative to delictual or contractual causes of action and how contributory responsibility is negotiated between defendants and plaintiffs.

[1377] See below at 4.3.4.

Case study: Electrical lamp causing burns to an infant

In this case, the author acted for an Australian retailer in defence of a claim for damages arising from personal injury caused by a defective electrical lamp. The retailer had sold a ceramic animal-shaped lamp, which has a light bulb fitted inside the ceramic shape, to a 3 year old child's mother. The mother placed the lamp on a bedside table next to the child's bed. During the night, the child pulled on the electric cable, causing the lamp to fall onto her bed and the light bulb dislodging from the ceramic shade, resulting in significant burn injuries.

The manufacturer had imported the ceramic, animal-shaped lamp shades to Australia and engaged an Australian electrical company to design and produce an electrical 'cord kit' (cable and light bulb socket) to be used with the lamp shade. The manufacturer sold the lamps to various retailers across Australia. When sold, the lamp shade and cord kit were packaged and sold separately, but were marketed as complimentary products. The manufacturer's physical and online store displayed the lamps lit, with the lamp kit in place inside the shade.

The child and her mother brought separate proceedings against the manufacturer, who subsequently joined the retailer as a third party to the proceedings. Pain and suffering damages were claimed on behalf of the child. The mother claimed economic loss damages resulting from the physical and psychological injuries sustained by the child as well as loss of earnings for having to cease working to take care of the child. In the primary proceedings, the plaintiffs' alleged that:

- the manufacturer operated a business importing and selling household and decorative wares and imported a bone china, animal-shaped lamp from an overseas manufacturer who did not have a place of business in Australia. Therefore, it was alleged that the manufacturer is deemed by section 7 of the ACL to be the manufacturer of the lamp.

- the manufacturer marketed the lamp as being safe for use as an electrical lamp and/or a child's night light and knew, or ought to have known, that the retailer would similarly market and sell the lamp to the public.

- the guarantees implied into consumer transactions by sections 54 and 55 of the ACL applied to the supply of the lamp. Pursuant to these sections, the manufacturer is alleged to have guaranteed that the lamp was of acceptable quality and reasonably fit for the purpose of being an electrical lamp and/or a child's night light.

- The injuries sustained by the child were caused by reason of the lamp:
  - Containing a 'safety defect' within the meaning of section 9 of the ACL;
  - Failing to comply with relevant safety standards;
  - Not being of acceptable quality;
  - Not being reasonably fit for the purpose it was supplied;
  - Containing a 'major failure' within the meaning of section 260 of the ACL.

The plaintiffs particularised the defectiveness of the lamp by arguing it had insufficient ventilation, causing the bulb to become dangerously hot during use, and the socket into which the bulb was positioned did not properly secure the bulb, meaning it could easily come free. For these reasons, the lamp and others like it had been recalled by Product Recall Australia shortly after the incident.

Damages were claimed pursuant to sections 139, 271, 272 and 273 of the ACL, being the provisions relating to strict manufacturer's liability and liability of product suppliers for breach of consumer guarantees. In the alternative, the plaintiffs pleaded a claim in negligence, alleging the manufacturer owed a duty to take reasonable care in the design, manufacture and supply of the lamp to avoid foreseeable risk of injury to the child. Particulars of negligence or breach of duty pleaded against the manufacturer included:

- Designing and/or manufacturing and/or distributing and/or supplying into the Australian market an electrical lamp that was unsafe by reason of the lamp having the 'defects' listed above in relation to the claim under the ACL.
- Failing to provide any warning in relation to these defects in the lamp;
- Failing to subject the lamp to any or any adequate form of hazard identification or risk assessment before supplying it into the Australian market;
- Failing to ensure that the lamp complied with Australian Standards;
- Marketing the lamp as suitable for a child's night light when it knew or ought to have known that it was not.

In its defence, the manufacturer denied that it was the deemed manufacturer or a supplier of the 'lamp'. Instead, the manufacturer admitted that it was the deemed manufacturer of the ceramic lamp shades and stated that it had purchased the lamp cord kits from an Australian manufacturer. The manufacturer sought to argue that it did not manufacture or supply a 'lamp' as it sold the shades and cord kits as separate items in separate packaging to retailers. Further, the manufacturer denied that it marketed or guaranteed the 'lamp' to be safe for use as an electrical lamp and/or a child's night light, but admitted that

it knew retailers might assemble some of the lamp kits and shades into lamps and sell them to consumers. As to the claim in negligence, the manufacturer denied that it owed a duty to take reasonable care in the design, manufacture and supply of the ‘lamp' as it did not manufacture or supply a ‘lamp'.

The manufacturer issued third party proceedings against the retailer, alleging that:

- The retailer was the manufacturer of the ‘lamp’ within the meaning of the ACL as it assembled the lamp shade and cord kit before selling it to the plaintiff’s mother.
- by reason of the sale of the ‘lamp’ by the retailer to the plaintiff’s mother, the retailer gave consumer guarantees pursuant to sections 54 and 55 of the ACL, that the lamp was of acceptable quality and reasonably fit for use as an electrical lamp and/or child’s night light. Therefore, if the lamp breached the consumer guarantees and/or had a safety defect, the retailer is liable for any resultant harm or loss.
- Further, it was alleged that it was a common law implied term of the contract of sale between the retailer and the plaintiff’s mother that the lamp would be of merchantable quality and/or reasonably fit for use as a child’s night light.
- In the alternative, the manufacturer alleged that the retailer owed a common law duty in negligence to take reasonable care in assembling and supplying the lamp to ensure that the lamp did not pose a reasonably foreseeable risk of injury. If the lamp did not comply with relevant safety standards, had insufficient ventilation causing the bulb to become dangerously hot and/or the socket into which the bulb was positioned did not properly secure the bulb, then the retailer breached its duty of care to the plaintiffs.

At mediation of this matter, the arguments in the retailer’s defence were as follows:

- The retailer was a small shop trading in a variety of homeware products and had no involvement in the design, manufacture or testing of the lamp components. The retailer simply on-sold the components in the condition they were supplied by the manufacturer. The retailer had placed the plastic bag containing the cord kit inside the box containing the lamp shade for ease of packaging when sold to customers - did not physically assemble the lamp prior to sale. Further, the retailer did not apply its own brand name to the components or hold itself out as the manufacturer of the lamp or either component to the public.

- The manufacturer is a deemed manufacturer of the cord kit. Prior to selling the cord kit to the retailer, the manufacturer had added the light bulb, a rubber fitting and assembly instructions to the plastic bag containing the electrical cord and light bulb socket. Arguably, this would qualify as 'assembling' the cord kit product for purposes of section 7 of the ACL.

- Irrespective of the technical arguments that could be made regarding 'assembly' of the lamp components to determine the true manufacturer of the 'lamp', the reality is that the lamp components were purposely designed or acquired by the manufacturer to be used together. The manufacturer also marketed the components as a 'lamp' on its website and in its physical store.

- Assuming for argument's sake that both defendants are deemed manufacturers of the 'lamp', it was argued that the manufacturer ought to bear the brunt of liability for the following reasons:
  - the manufacturer had obtained electrical certifications for the cord kit but not the assembled lamp. It obtained advice from an electrical safety consultant that, as long as the cord kit and lamp shade were sold separately and not marketed as a lamp, the

product would not be required to undergo further testing and certification as an electrical appliance for purposes of compliance with Australian Standards. In order to speed up the approval process, the manufacturer did not bother to have the 'lamp' tested and certified.

  - The manufacturer's attempt to avoid further safety testing by packaging the components separately was outside the knowledge of the retailer. The retailer did not specialise in electrical goods and was entitled to rely (to a large degree), on the manufacturer selling electrical products that are safe for its intended use and compliant with relevant safety regulations and standards.

- The retailer denied that it purposely marketed the lamp as safe for use as a child's night light. Although the animal-shaped lamp shade may be appealing to a child, it was made from bone china, not a heat resistant, shatterproof material. Common sense dictates that a ceramic object ought to be placed out of reach of a 3 year old infant due to the obvious risk of injury.

Ultimately, following some negotiation it was agreed between the defendants that the retailer would contribute 33% towards joint settlement offers to the plaintiffs.

Comparison to position under CPA

If the facts of the above case study were to form the basis for a section 61 claim in South Africa, it seems clear that the retailer who sold the lamp to the consumer would be considered a "retailer" for purposes of section 61. Whether the retailer would be considered a "producer" within the meaning of section 1, is unlikely. The retailer had no part to play in the production of the lamp shade or cord kit. The fact that the retailer placed the cord kit inside the packaging containing the lamp shade when delivering it to the

plaintiff is unlikely to amount to 'producing' the lamp for purposes of the definition of "producer" as the retailer had not applied, for instance, a personal or business name, trade mark or other visual representation to the goods that created a reasonable expectation that the retailer had manufactured the lamp.

The section 61 plaintiff may seek to argue that the lamp had a "defect" within the meaning of section 61(1)(b) and section 53(1)(a) in that the mechanism which fails to properly secure the light bulb inside the lamp shade amounts to a "*material imperfection in the manufacture"* of the lamp or its components that renders it "*less acceptable than persons generally would be reasonably entitled to expect in the circumstance*."

Alternatively, the plaintiff may seek to argue that the lamp contained a "hazard" within the meaning of section 61(1)(c) and section 53(1)(c)(ii) in that the mechanism which fails to properly secure the light bulb inside the lamp shade presents a "*significant risk of personal injury"* when the goods are utilised. In this regard, the court would arguably look at the intended or expected uses of the lamp. Whether a court would consider placing a lamp next to an infant's bed within reach of that infant, who then pulls hard on the cord, may not be considered a normal use of the lamp. However, the definition of "hazard" simply refers to when the goods are "utilised", not when the goods are "utilised in a normal or intended manner." Therefore, a risk of harm presented by the lamp while switched on ('utilised') may be sufficient. Arguably, the requirement of *"significant risk of personal injury"* would be satisfied in this case given that burns by an electrical lamp could be severe.

It may be possible to argue that the lamp had a "failure" within the meaning of section 61(1)(b) and section 53(1)(b) on the basis that it failed to "*perform in the intended manner*

or to the intended effect." While the lamp as a whole was still working to the intended effect of providing light, it could be argued that the lamp was intended to provide light in such a manner that the light bulb would remain secure within the lamp shade when utilised, even when the cord is pulled. However, this seems to be a laboured interpretation of the "failure" concept and is unlikely to succeed.

It would be open to a plaintiff to argue that the lamp was "unsafe" in that, due to the problematic mechanism which inadequately secures the light bulb inside the lamp shade, the lamp had a characteristic, failure, defect or hazard, which presents an extreme risk of personal injury to the consumer or to other persons. It is unclear why a plaintiff would seek to establish that the lamp posed an "extreme" risk of harm to establish it was "unsafe" if the plaintiff could succeed by merely proving the lamp presented a "significant" risk of harm and therefore contained a "hazard".

The retailer may be able to invoke the defence under section 61(4)(c) on the basis that it was unreasonable to expect the retailer to have discovered the unsafe product characteristic, failure, defect or hazard in light of the retailer's role in marketing the lamp to consumers. While the retailer may argue that it had simply on sold the lamp shade and cord kit in its original packaging without assembling them, the retailer did display sample lamps in its store which it had assembled. A court may, therefore, find that the design flaw causing the light bulb to sit very loosely inside the lamp shade could reasonably have been discovered by the retailer while assembling the display lamps.

The party who had supplied the lamp shade and component to the retailer would arguably be considered an "importer" and "distributor" of the lamp shade within the meaning of the

CPA on the basis that it had imported the lamp shade to South Africa and sold the shade to a retailer. This same party would arguably be considered a “manufacturer” of the cord kit in that it had caused some cord kit components to be produced by another party and added further items to the cord kit bag (light bulb, a rubber fitting and assembly instructions), thereby playing a part in “producing” the cord kit product. Although the CPA’s definition of “producer” does not include a reference to “assembly” of components, as the ACL does in its definition of “manufacturer”, the reference in the CPA’s definition of producer to ‘otherwise produces the goods’ is arguably broad, on the plain meaning of these words, to include” assembly of components.”

The question is whether the supplier of the shade and cord kit would qualify as a ‘producer’ of the ultimate lamp product. A South African court may apply the definition of “producer”, particularly the phrase “otherwise produces” here to include the fact that this party coordinated the design and manufacture of both components and had intended for them to be supplied together to consumers as lamps. It follows that this party would not be able to avail itself of the defence in section 61(4)(c) which would arguably achieve a fair result as it was best placed to discover any design defect in the ultimate lamp product during the design or manufacturing stage.

Comparative import of case study

This case study illustrates how a person harmed by defective goods can in practice pursue a strict product liability claim in addition to a common law claim in negligence and breach of contract (implied guarantees/warranties) by pleading these claims in the alternative. The

Australian example shows an interesting interaction and overlap in the pleadings between the strict liability claim under the ACL, common law of negligence and contract, namely:

- The particulars of negligence pleaded against the manufacturer and retailer include the same allegations of defectiveness used for the claim under the ACL, i.e. the product contained a 'safety defect' within the meaning of the ACL, failed to comply with safety standards, containing a 'major failure' within the meaning of the ACL and not being of acceptable quality or reasonably fit for purpose.

- The implied guarantees of acceptable quality and reasonable fitness for purpose are implied by the common law of contract into contracts of sale are also implied by the ACL into the supply of consumer goods. Breach of these implied guarantees are then pleaded as one of the particulars of negligence.

It is possible that, similarly to the practice in Australia, plaintiffs in South Africa would plead all possible causes of action to claim consequential damages for harm arising from a product defect, in order to optimise their prospects of recovery. Depending on the facts of the particular case, the plaintiff could potentially bring a damages claim for breach of contract (breach of statutorily implied warranty or other contractual terms relating to the quality of the goods supplied), and/or an Aquilian action and/or a section 61-claim. However, there are certain practical restrictions on a section 61 plaintiff in approaching a civil court, discussed briefly below at 4.3.4. Nevertheless, it is theoretically possible to plead these causes of action in the alternative.

Finally, the case study illustrates how contributory responsibility between defendants could in practice be argued in a strict product liability claim in much the same way as

apportionment of fault between defendants, having regard to the role of each supplier in the supply chain and all other relevant circumstances relating to the supply of the good. For instance, a retailer who had the opportunity to open a product's packaging, inspect the product and display an operating sample model of the product in its store, arguably has a greater exposure to liability, as between defendants, than a supplier who simply on-supplies a product that would be spoiled or otherwise become unmarketable once opened and inspected.

With respect to apportionment of liability, a South African retailer may similarly argue that the manufacturer ought to bear a greater share of section 61 liability, by relying on section 61(6)(c) of the CPA. As discussed above,[1378] this section provides that there is no limitation on the authority of the court to apportion liability among persons who are found jointly and severally liable.

Where an Australian court has determined that liability arises on more than one cause of action pleaded, the plaintiff has to elect a cause of action pursuant to which the court is to assess quantum of damages, before final judgment is entered by the court.[1379] By contrast, South African courts are likely to apply the rules of the cause of action under which the plaintiff would be awarded the greatest amount of damages, if the measure of damages does indeed differ.[1380] Nevertheless, a plaintiff in both jurisdictions would need to give consideration to the legal and evidentiary requirements and the scope of damages recoverable in relation to each concurrent cause of action prior to commencing proceedings.

1378 4.2.7.4.
1379 3.4.1.5.
1380 *Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 4 SA 238 (SR); Van der Walt *Delict* (1979) at 7-8.

4.3.4 Concurrence of common law actions for damages and Section 61

It would appear from section 2(10)[1381] read with section 76 of the CPA that statutory remedies afforded by the CPA are intended to co-exist with common law remedies and cannot limit or restrict the scope of existing common law protection afforded to consumers.[1382] However, from a practical perspective, a plaintiff's access to civil courts under the CPA is restricted by section 69(d), which provides that a plaintiff may only approach a civil court (other than a consumer court) "*if all other remedies available to that person in terms of national legislation have been exhausted."* This section suggests that a plaintiff would have to satisfy a civil court that he or she had attempted to obtain redress by way of other remedies, such as alternative dispute resolution and approaching the various entities listed in section 69 "Enforcement of rights by consumer" including the National Consumer Commission, the National Consumer Tribunal, ombuds with jurisdiction and consumer courts.

Section 69(d) creates legal uncertainty and practical problems for plaintiffs. It is unclear from this provision whether a plaintiff would literally have to exhaust "all other remedies" available under national legislation, which would be very onerous, particularly on vulnerable, impecunious and unsophisticated plaintiffs, and would significantly restrict access to civil courts. A detailed discussion of the implications of section 69(d) for access to civil courts is beyond the scope of this study.[1383] However, it is clear that this aspect should be clarified by legislature.

1381 See discussion of section 2(10) above at 4.1.2.

1382 See 1.2.1 supra. The effect of the application provisions of the CPA are discussed in further detail in

1383 For a discussion of the problems presented by section 69(d) and the routes to redress implied by section 69, see: Van Heerden *Section 69* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 69-15 to 69-20; Van Eeden Consumer Protection in South Africa (2013) 452 - 454.

Leaving the practical aspects of obtaining redress under the CPA aside, it is theoretically possible for a section 61 action to arise in concurrence with common law actions. It follows that liability for damages for harm caused by defective goods may arise from breach of contract and/or delict and/or section 61 of the CPA, depending on which actions' legal requirements are met. Whether a concurrent delictual claim for damages arises in circumstances where the supplier of a defective product and the plaintiff had a contractual relationship will still be governed by the common law principles regarding concurrence of contract and delict as developed by courts.[1384]

Drawing distinctions between remedies are of significant practical importance where the facts simultaneously give rise to a common law contractual and delictual claim for damages, providing the claimant with a choice of action. In these circumstances, the claimant should consider the following when choosing how to pursue his or her claim:

- the respective purposes of these actions;
- the type of damages recoverable under each action;
- whether proof of fault is required;
- apportionment of damages; and
- limitation periods.[1385]

For instance, Aquilian damages are aimed at restoring the claimant to the position he or she would have been in had the harm never been suffered (negative *interesse)*.[1386] By

[1384] For general discussion see: Neethling & Potgieter 'Borderline between the Law of Contract and the Law of Delict' (2012) *THRHR,* (75) 115; Hutchison & Van Heerden 'The tort/contract divide seen from the South African Perspective' (1997) *Acta Juridica* 102. For case law, see for instance: *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C); *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA).

[1385] Loubser & Midgley *The Law of Delict in South Africa* (2012) 185-6.

[1386] 2.3.1.1(ii).

contrast, damages for breach of contract are intended to put the claimant in the position he or she would have been had the contract been properly performed (positive *interesse)*.[1387]

Further, under the law of delict, patrimonial loss is recoverable by means of the Aquilian action, while compensation for non-patrimonial loss may be claimed with either the *actio iniuriarum* or the action for pain and suffering.[1388] By contrast, a damages claim based on breach of contract is limited to recovery of patrimonial loss.[1389] Any non-patrimonial loss resulting from the breach, such as pain and suffering or loss of amenities, would have to be recovered by means of a separate, delictual claim.[1390]

Consideration of these differences between concurrent actions is equally important where a claimant is presented with a choice of common law remedies and an action under section 61 of the CPA. For instance, there may be cases where it would be more beneficial for a contractual party to pursue a claim in delict or under section 61, as opposed to a contractual claim for damages as the contract in question may limit the amount of damages recoverable in the event of harm caused by product defects. Further, a contractual party may be able to pursue a claim against numerous parties in the supply chain with a delictual claim or section 61 claim, whereas a claim for contractual damages could only be pursued against another contractual party who breached the contract by supplying a harm-causing, defective product.

There may be scenarios where a plaintiff would not have a section 61 claim but a claim in delict does arise. Examples may include circumstances where:

1387 2.2.1.3(iii).
1388 2.3.1.1(ii).
1389 2.2.1.3(iii).
1390 Hutchison & Pretorius *The Law of Contract in South Africa* (2012) 314-315.

- the plaintiff fails to meet the definition of "consumer" as defined in the CPA.[1391] For instance, it appears that bystanders to product use are not protected by section 61.[1392]
- the plaintiff was not a "consumer" within the meaning of product user in paragraph (c) of the definition of "consumer", but a party to whom the defendant marketed the goods[1393] or with whom the defendant entered into a transaction,[1394] and that marketing or transaction did not occur "*in the ordinary course of the supplier's business.*" For example, a once-off sale of goods by a supplier.
- where the goods that caused harm do not fall within the definition of "goods" as defined in section 1. However, it is difficult to conceive of goods that would not fall within the broad definition of "goods" as defined by the CPA.
- where the plaintiff cannot show the goods are "unsafe", contained a "hazard", "defect" or had "inadequate instructions or warnings" or "failed" within the meaning of section 61(1)(a)-(c) read with section 53. The plaintiff may still be able to show that the goods were defective or harmful and had caused loss for which delictual liability should arise.
- where the prescription period for purposes of a section 61 claim has expired but not a claim in delict, provided prescription runs differently for these two actions. There is legal uncertainty in this regard.[1395]

There may also be circumstances where the prospect of succeeding with a contractual claim for damages is greater than a section 61 claim or delictual claim. For example, where goods are sold which do not clearly fall within any of the categories of product deficiencies listed in section 61, but nevertheless breaches certain specifications

[1391] As held by the SCA in *Eskom Holdings Limited v Halstead Cleak* ZASCA [2016] 150 discussed above at 4.5.2.
[1392] See discussion regarding bystanders above at 4.2.2.
[1393] Paragraph (a) of the definition of "consumer".
[1394] Paragraph (b) of the definition of "consumer".
[1395] 4.2.7.5.

contractually agreed upon by the claimant and supplier. Establishing that a product supplied breached contractual specifications may be easier than proving the supplier is guilty of negligent conduct during the manufacturing or distribution process or that the goods meet any of the alternative definitions of defectiveness for purposes of section 61.

In conclusion, section 61 may certainly provide an additional avenue for redress, over and above common law remedies, where harm is caused by defective goods. However, due to various theoretical and practical restrictions to this remedy, the remedies founded in delict and contract remain relevant.

CHAPTER 5

CONCLUSIONS

5.1 SCOPE OF LIABILITY: DIFFERENT ACTIONS AND CONCURRENCE

5.1.1 Section 61 and delictual damages

- The **scope of parties liable** under a section 61 claim is arguably broader than a common law delictual claim for damages.[1396] The Aquilian action can theoretically be brought against the actual manufacturer of the defective good and possibly a subsequent supplier(s) such as a distributor or retailer, provided the plaintiff can establish that the subsequent supplier owed a duty of care to the plaintiff with respect to the supply of the goods. In contrast, the section 61 action simply requires that the defendant meet the definition of either "producer", "importer", "distributor" or "retailer" as defined by the CPA, irrespective of whether a duty of care was owed by that defendant.

- The **scope of potential claimants** under a section 61 claim appears broader and narrower than the scope of potential claimants in a delictual claim in different respects.[1397] Generally speaking, the scope of potential claimants under a section 61 claim is broader than the scope of claimants under a delictual claim on the basis that a section 61 claimant need not establish the supplier of the defective goods owed a duty of care to it. A section 61 claimant merely has to show that goods with a deficiency as defined in section 53 were supplied by the defendant in the ordinary course of business and the claimant was harmed by it. In other respects, the scope of potential claimants in a section 61 claim is narrower than a delictual claim. A bystander does not appear to have a claim under section 61 as a bystander does not meet the definition of "consumer", whereas a claim in delict may arise if it can be shown that the supplier of

[1396] 4.2.1. See conclusions below at 5.2.1.
[1397] 4.2.2. See conclusions below at 5.2.2.

the defective product owed a duty of care not to cause harm to the bystander, in other words, that the harm to that bystander was reasonably foreseeable by the supplier.

- The **scope of 'goods'** which may be the subject of a section 61-claim is arguably no broader than the scope of goods for purposes of a common law delictual claim for damages.[1398] However, this is subject to how broadly South African courts will interpret the wide-ranging categories or items listed in the CPA's definition of 'goods'. With respect to second-hand or used goods, the scope of goods under section 61 appears to be broader than the common law of delict. It has been held by the High Court that the CPA applies to "used goods". On the other hand, a manufacturer may not owe a delictual duty of care to a plaintiff with respect to the safety of second-hand goods, for instance, where those goods had passed through multiple previous owners.

- Suppliers of **professional services** may be held to two different standards: a fault-based standard with respect to professional services rendered and strict liability for defective goods supplied in conjunction with those services.[1399]

- The general principles of **causation**, as developed in the common law of delict, are likely to be applied by South African courts in determining section 61-liability.[1400] It is argued that South African courts are likely to follow a similar approach and allow for an inference that goods contained a 'defect', 'hazard' or 'unsafe' characteristic, akin to the *res ipsa loquitur rule* at common law, where the circumstances of the harm-causing incident warrant this.[1401] Courts may also apply a 'material contribution to risk' approach

[1398] 4.2.3. See conclusions below at 5.2.3.
[1399] Ibid.
[1400] 4.2.4. See conclusions below at 5.2.4.
[1401] Ibid.

in circumstances where there are competing theories of factual causation, as recently recognised by the Constitutional Court in *Lee v Minister of Correctional Services.*[1402]

- It is contended that section 61 does not extend the **scope or damages** that may be recoverable under the common law of delict.[1403] Refer to the conclusions below at 5.2.5.

5.1.2 Section 61 and contractual damages

- It is argued that the **scope of parties liable and potential claimants** in a section 61 claim is significantly broader than a common law contractual claim for damages, which is generally limited to the party with whom the plaintiff had contracted for the supply of the good (privity of contract).[1404]

- The **scope of 'goods'** which may be the subject of a section 61-claim is arguably no broader than the scope of goods for purposes of a common law contractual claim for damages.[1405]

- It is contended that the **scope or damages** recoverable under section 61 is broader than the scope of damages recoverable by means of a common law damages claim for breach of contract on the basis that pain and suffering damages cannot be recovered under an action for breach of contract but would be recoverable under a section 61 action.[1406]

[1402] 2013 (2) SA 144 (CC).
[1403] 4.2.5. See conclusions below at 5.2.5.
[1404] 4.2.1; 4.2.2. See conclusions below at 5.2.1; 5.2.2.
[1405] 4.2.3. See conclusions below at 5.2.3.
[1406] 4.2.5. See conclusions below at 5.2.5.

5.1.3 Concurrence of section 61 and common law actions

- Similar to the strict product liability regimes in the EU, the US and Australia, section 61 of the CPA does not replace common law remedies, it simply provides an additional cause of action.[1407] From a practical perspective, a section 61-plaintiff's access to civil courts is restricted by section 69(d), which provides that a plaintiff may only approach a civil court (other than a consumer court) *"if all other remedies available to that person in terms of national legislation have been exhausted."* This provision may place a very onerous duty on plaintiffs if it is interpreted literally as requiring every possible alternative remedy to be exhausted before approaching a civil court. Nevertheless, it is theoretically possible for a plaintiff to have alternative causes of action in contract, delict and under section 61 for harm caused by defective goods.

- In scenarios where a section 61 action and common law actions for damages under delict and contract are concurrently available, a plaintiff has a choice of actions and may bring these actions in the alternative.[1408] Where a plaintiff has a choice of actions, it is important to consider the requirements for each action and the relief available under each action. For instance, Aquilian damages are aimed at restoring the claimant to the position he or she would have been in had the harm never been suffered (negative *interesse)*.[1409] By contrast, damages for breach of contract are intended to put the claimant in the position he or she would have been had the contract been properly performed (positive *interesse)*.[1410] Further, under the law of delict, patrimonial loss is recoverable by means of the Aquilian action, while compensation for non-patrimonial loss may be claimed with either the *actio iniuriarum* or the action for pain and

[1407] 4.3.4.
[1408] 4.3.4.
[1409] 2.3.1.1(ii).
[1410] 2.2.1.3(iii).

suffering.[1411] By contrast, a damages claim based on breach of contract is limited to recovery of patrimonial loss.[1412] Any non-patrimonial loss resulting from the breach, such as pain and suffering or loss of amenities, would have to be recovered by means of a separate, delictual claim.

- Consideration of these differences between concurrent actions is equally important where a claimant is presented with a choice of common law remedies and an action under section 61 of the CPA. For instance, there may be cases where it would be more beneficial for a contractual party to pursue a claim in delict or under section 61, as opposed to a contractual claim for damages as the contract in question may limit the amount of damages recoverable in the event of harm caused by product defects. Further, a contractual party may be able to pursue a claim against numerous parties in the supply chain with a delictual claim or section 61 claim, whereas a claim for contractual damages could only be pursued against another contractual party who breached the contract by supplying a harm-causing, defective product.

- There may be scenarios where a plaintiff would not have a section 61 claim but a claim in delict does arise. Examples may include circumstances where:
  - the plaintiff fails to meet the definition of "consumer" as defined in the CPA.[1413] For instance, it appears that bystanders to product use are not protected by section 61.[1414]

[1411] 2.3.1.1(ii).
[1412] 2.2.1.3(iii).
[1413] As held by the SCA in *Eskom Holdings Limited v Halstead Cleak* ZASCA [2016] 150 discussed above at 4.5.2.
[1414] See discussion regarding bystanders above at 4.2.2.

- the plaintiff was not a "consumer" within the meaning of product user in paragraph (c) of the definition of "consumer", but a party to whom the defendant marketed the goods[1415] or with whom the defendant entered into a transaction,[1416] and that marketing or transaction did not occur "*in the ordinary course of the supplier's business."* For example, a once-off sale of goods by a supplier.
- where the goods that caused harm do not fall within the definition of "goods" as defined in section 1. However, it is difficult to conceive of goods that would not fall within the broad definition of "goods" as defined by the CPA.
- where the plaintiff cannot show the goods are "unsafe", contained a "hazard", "defect" or had "inadequate instructions or warnings" or "failed" within the meaning of section 61(1)(a)-(c) read with section 53. The plaintiff may still be able to show that the goods were defective or harmful and had caused loss for which delictual liability should arise.
- where the prescription period for purposes of a section 61 claim has expired but not a claim in delict, provided prescription runs differently for these two actions. There is legal uncertainty in this regard.[1417]

- There may also be circumstances where the prospect of succeeding with a contractual claim for damages is greater than a section 61 claim or delictual claim. For example, where goods are sold which do not clearly fall within any of the categories of product deficiencies listed in section 61, but nevertheless breaches certain specifications contractually agreed upon by the claimant and supplier. Establishing that a product supplied breached contractual specifications may be easier than proving the supplier

[1415] Paragraph (a) of the definition of "consumer".
[1416] Paragraph (b) of the definition of "consumer".
[1417] 4.2.7.5.

is guilty of negligent conduct during the manufacturing or distribution process or that the goods meet any of the definitions of defectiveness for purposes of section 61.

- Similarly to the practice in Australia illustrated by the case study above[1418] based on the author's personal experience in legal practice in Australia, South African plaintiffs are likely to plead all possible causes of action to claim damages for harm arising from a product defect, which may include any combination of a contractual claim, delictual claim and a section 61 claim, depending on which actions' requirements are met.

- Where a South African court has determined that liability arises on more than one cause of action pleaded, the court is likely to apply the rules of the cause of action under which the plaintiff would be awarded the greatest amount of damages, if the measure of damages does indeed differ.[1419] This is in contrast to the Australian position where the plaintiff who succeeds on more than one alternative causes of action, has to elect a cause of action pursuant to which the court is to assess the quantum of damages, before final judgment is entered by the court.[1420]

- It is argued that, like the Australian practice illustrated by the case study above,[1421] contributory responsibility between defendants could in practice be argued in a section 61 strict liability claim in much the same way as apportionment of fault between defendants at common law, having regard to the role of each supplier in the supply chain and all other relevant circumstances relating to the supply of the good in

[1418] 4.3.3.
[1419] 4.5.3.
[1420] Ibid.
[1421] Ibid.

question.[1422] Alternatively, courts may apply a doctrine of comparative causation, taking into account to what degree the plaintiff and defendant(s)' actions contributed to the harm.

- In conclusion, section 61 may certainly provide an additional avenue for redress, over and above common law remedies, where harm is caused by defective goods. However, due to various theoretical and practical restrictions to this remedy, the remedies founded in delict and contract remain relevant.

5.2 SCOPE OF LIABILITY: INTERPRETATION OF SECTION 61 OF THE CPA

5.2.1 Parties liable

- Section 61 imposes liability on the "producer", "importer", "distributor" or "retailer" was defined in section 1 of the Act, whether these suppliers operated on a "*for profit basis or otherwise*" and irrespective of whether they were required or licenced by statute to provide goods. [1423] Where the plaintiff cannot identify the actual producer, he or she may be able to identify a number of other parties in the supply chain against whom the section 61 action can be brought.

- The scope of potential defendants under the CPA is generally consistent with the Australian and American position.[1424] The EU Directive's scope of potential defendants is narrower in that its definition of "producer" does not include distributors or retailers,

[1422] 4.2.7.4. See conclusions below at 5.2.7.4.
[1423] 4.2.1.
[1424] Ibid.

only producers and importers.[1425] However, distributors or retailers may be held liable under the EU Directive if they are unable to identify their own supplier.

- Similar to the position at common law, section 61-liability is joint and several and is imposed on all parties who participate in the retail process, from the producer to the ultimate retailer.[1426]

- Section 5(5) of the CPA may have the (perhaps unintended) effect that a retailer (as buyer) may have a section 61 claim against the distributor (as seller) or the producer and the distributor (as buyer) against the producer.[1427]

5.2.2 Potential claimants

- The wording of section 61 is ambiguous as to whether a section 61-claimant is required to meet the description of a "consumer" as defined in the CPA, or whether the remedy extends to persons other than a "consumer" such as bystanders. Further, it is unclear from the wording of the CPA whether a product user, as defined in paragraph (c) of the definition of consumer, would be entitled to bring a claim under section 61.[1428]

- The prevailing position in foreign jurisdictions appears to be that strict product liability actions against manufacturers are not only available to persons who are "consumers",

[1425] Ibid.
[1426] Ibid.
[1427] 4.2.1. See conclusions at 5.2.2.
[1428] 4.2.2.

but any person or individual who suffers personal injury or property damage due to defective goods.[1429]

- In light of the consumer protectionist policy underlying the CPA, the ambiguity created by the wording of section 61 and the prevailing position in the foreign jurisdictions considered in this study, it is argued that section 61 should be interpreted as being available to all persons falling within paragraph (c) of the definition of "consumer" under CPA, in other words, including users of goods. This position was recently confirmed by the Supreme Court of Appeal in *Eskom Holdings Limited v Halstead-Cleak*.[1430] However, there is legal uncertainty as to when when a person would qualify as "using" goods within the meaning of paragraph (b) of the definition of "consumer" and whether this could, in some instances, include a bystander.

- The position with respect to bystanders harmed by defective goods is not clear under section 61. On the face of it, the CPA's definition of "consumer" does not appear to include bystanders who are harmed as a result of defective goods being used by another person (the consumer or user). However, upon closer consideration of paragraph (c) of the definition of "consumer", there is some ambiguity, at least in the context of electricity as discussed above, as to when a person would be considered to "use" the electricity or when a person is simply receiving an inadvertent benefit from the electricity as a bystander. Further, the ordinary, literal meaning of "any natural person" in section 61(5) would appear broad enough to include "bystanders" harmed by product use, as opposed to the references to "consumer" elsewhere in section 61, and this further creates ambiguity which arguably warrants a purposive interpretation.

[1429] 3.5.2.
[1430] ZASCA [2016] 150 at [15]. This case is discussed in detail below at 4.3.2.

- It is argued that the welfare of consumers generally would not necessarily be promoted by imposing strict liability for harm to bystanders caused by defective products. The imposition of strict product liability on any bystanders may open the floodgates of litigation and impose an excessively onerous burden on industry, thereby stifling innovation and resulting in reduced access to consumer goods. The CPA's purpose of estabslishing a framework for a 'sustainable' consumer market would perhaps not be served by inclusion of bystanders. It may be that the legislature deemed it more appropriate for harm to bystanders to be governed by Aquilian liability, which requires the bystander to establish the product supplier owed a duty of care to him or her in the circumstances, which arguably provides more scope for a fair outcome than strict liability in this context.

- The prevailing position in the foreign jurisdictions compared appears to be to protect any individual harmed by defective goods, which arguably includes bystanders.[1431] However, it should be borne in mind that the foreign jurisdictions compared are all developed countries, whereas in a developing country such as South Africa it may be too onerous on the supply chain and less beneficial to the welfare of consumers generally to impose strict product liability for harm to bystanders.

- In the interest of legal certainty, it would have been preferable for the legislature to refer consistently in section 61 to either "consumers" or "persons" harmed by goods and to specifically state whether bystanders harmed by defective goods are protected by section 61. However, the Supreme Court of Appeal has recently held in *Eskom*

[1431] 3.5.2.

Holdings Limited v Halstead-Cleak.[1432] that the reference to "natural person" in section 61(5) was merely to distinguish it from "person" or a "consumer" which may also include a juristic person.

- In light of the wording of section 61 read with the definition of "consumer" in section 1 and the SCA's decision in *Halstead-Cleak*, the position in South Africa appears to be that:
  - section 61 would be available to a product user who is harmed by a good that was subject of a "transaction" to which a "consumer" (not necessarily the user) is a party;
  - section 61 is not available to a bystander harmed by goods being used by a consumer or product user.

5.2.3 Goods

- The definition of "goods" in section 1 makes no express reference to component goods which are later integrated into finished goods.[1433] However, section 53(1) defines the various types of product deficiencies referred to in section 61 and states that these deficiencies apply in respect of "any "good" and also "any component of any goods". Therefore, it is clear that section 61 applies to defective component goods that cause harm.

- The definition of "goods" makes no reference to second-hand or used goods. This is consistent with the position under the EU Directive[1434] and the US Restatement.[1435] It

[1432] ZASCA [2016] 150 at [15]. This case is discussed in detail below at 4.3.2.
[1433] 4.2.3.
[1434] 3.5.3.
[1435] 3.5.3.

is arguable that the wording of paragraph (a) of CPA's definition of "goods" is equally broad enough to read in 'second-hand goods', where such goods are marketed for human consumption and provided 'consumption' is read to mean consumption of goods in the economic sense. However, given that the plain meaning of paragraph (a) of "goods" is not ambiguous and simply does not refer to second-hand goods, it would seem that a deviation from this is contrary to the rules of statutory interpretation. However, the the High Court has held that the CPA applies to second-hand or "used goods".[1436] It is questioned whether this judgment is correct, given that the definition of "goods" does not raise any ambiguity which justifies a deviation from the plain meaning of its words. Further, it is argued that the imposition of strict liability on second-hand or used goods may not promote the welfare of consumers generally, particularly vulnerable consumers in South Africa.

- The definition of "goods" under the CPA includes an open-ended category of intangible, informational or intellectual products.[1437] Information or data in itself, as distinguished from the physical medium on which it is written, would qualify as "good." This is a departure from the foreign jurisdictions considered in this study where strict product liability is generally applied to tangible goods.[1438] The boundaries of this category are unclear and may include generally disseminated information relied upon by an incalculable number of users, for instance via digital or cyber networks, giving rise to concerns of indeterminate liability.

[1436] *Vousvoukis v Queen Ace CC t/a Ace Motors* (unreported, case no 3878/2013, [2015] ZAECGHC 64 (19 June 2015).
[1437] 4.2.3.
[1438] 3.5.3.

- Given the potentially wide-spread harm caused by defective information coupled with the policy consideration that the threat of strict liability could *"inhibit the socially and economically desirable free dissemination of ideas and theories*," the argument in favour of a negligence standard for defective informational goods put forth by Loubser & Reid is supported.[1439]

- Alternatively, it is suggested that strict liability for defective informational good could be regulated more extensively by defining in clearer terms:

  - the types of informational goods covered by the intangible information category;
  - whether the supply of electronic information or advice provided as part of professional advisory services is included in the category of informational goods and how this would impact on existing industry-specific standards prescribed for professional service providers and established common law liability for professional negligence;
  - the extent of liability of the various parties involved in the supply of defective information having regard to their respective roles in relation to the information, for instance, authors, editors, software design engineers, website or system operators and the manufacturers of the physical media on which information is written.

- There is a possibility that the informational goods may include the informational content of professional advice, for instance, engineering or architectural designs, supplied in electronic format to clients.[1440] If this is the case, harm caused by a 'defect' in this professional advice would give rise to strict liability, which would be a significant departure from the traditional Aquilian basis of professional liability. However, it is

[1439] 4.2.3.
[1440] 4.2.3.

argued that, if it was the legislature's intention to impose strict liability on professional advisory service providers, this would have been expressed in clearer terms in the CPA. This view is supported by the fact that services are regulated separately in section 54 of the CPA.

- In the interest of legal certainty, it is suggested that the position regarding liability of professional service providers could be clarified in the CPA. For instance, the definition of "goods" in section 1 could be amended so as to exclude any informational content of any professional advice or other intellectual content (such as technical designs or drawings) provided as part of a professional advisory service.

5.2.4 Causation

- The CPA does not expressly prescribe a test for causation to be applied in relation to section 61.[1441] In the absence of any legislative clarification, it is suggested that South African courts will apply the common law principles for establishing causation as they apply in the law of delict. This is consistent with the approach in foreign jurisdictions considered.[1442]

- In light of the prevailing practice in foreign jurisdictions where an inference of defectiveness is drawn in appropriate cases, South African courts may follow a similar approach and allow for an inference that goods contained a 'defect', 'hazard' or 'unsafe' characteristic, akin to the *res ipsa loquitur rule* at common law, where the circumstances of the harm-causing incident warrant this. However, South African

[1441] 4.2.4.
[1442] 3.5.4.

courts have been reluctant to apply this doctrine in delictual claims and it has to date not been applied in a product liability case under the Aquilian action. It is argued that the underlying consumer protectionist policy of the CPA in introducing strict product liability would arguably be better served by allowing for an inference of defectiveness to assist claimants in discharging the evidentiary burden of establishing defectiveness and causation in circumstances where the facts clearly justify such an inference.[1443]

- Where factual causation involves consideration of two or more competing, but independent potential causes of the harm and there is insufficient evidence to establish, on a balance of probabilities, factual causation, South African courts may apply the so-called 'material contribution to risk' doctrine, as recently adopted by the Constitutional Court in *Lee v Minister of Correctional Services*.[1444] Where a section 61 plaintiff's harm may plausibly have been caused by defective goods and another, unreleated negligent act or cause, the plaintiff may be able to establish factual causation against the defective goods supplier by simply showing the defective goods had increased the risk of harm. It remains to be seen whether the increase in risk ought to have been material or substantial. This approach would greatly assist plaintiffs in overcoming the inherent difficulties posed by the traditional "but-for" test for factual causation, as is evident from product liability cases under the Aquilian action.

- South African courts may seek guidance from English law English case law applying the UKCPA where it has on numerous occasions been considered what standard of proof is required to establish defectiveness and causation.[1445] If South African courts

[1443] 4.2.2 (iv).
[1444] 2013 (2) SA 144 (CC). See 4.2.4.
[1445] 4.2.4.

were to follow the approach in the most recent cases on this point, then section 61 plaintiffs would merely need to prove the existence of a defect in broad or general terms, such as "*a defect in the electrics of the vehicle*" and a court would simply have to determine that the loss was caused by that defect and not another cause.

5.2.5 Harm and damages

- Section 61(6)(b) provides that nothing in section 61 limits the authority of the court to '*determine the extent and monetary value of any damages, including economic loss'*.[1446] It is argued that, in the absence of any further legislative clarification as to the method for assessing damages under section 61, this section suggests the general principles for assessing damages as developed under the common law of delict will apply to section 61 damages. This is supported in light of section 2(10) of the the CPA and the interpretive presumption that legislation does not intend to affect the existing common law. Further, it would be in the interest of legal certainty to interpret the CPA in a manner that remains as consistent as possible with the existing common law framework for product liability.

- Section 61(5) is substantially consistent with the European, Australian and American position in relation to the categories of harm for which strict product liability is imposed, being personal injury, property damage and any consequential loss flowing from the personal injury or property damage.[1447]

[1446] 4.2.5.
[1447] 3.5.5.

- Section 61(5)(c) imposes liability for *"any loss of, or physical damage to any property, irrespective of whether it is movable or immovable*." The plain meaning of the words "any property" can be interpreted as including damage to the defective product itself and any economic loss resulting from its replacement. If this was the legislature's intention, the CPA differs from the foreign strict liability regimes considered, which expressly exclude liability for harm to the defective product itself.[1448] If, however, the words "any property" are ambiguous in this respect, a purposive interpretation of this provision would arguably dictate that section 61-plaintiffs who stood in a contractual relationship with a supplier be entitled to recover the damage to the product itself by way of a section 61-claim as this interpretation favours consumers, as opposed to requiring such plaintiffs to make out a separate claim for breach of contract or consumer guarantees under section 56 of the CPA. Whilst this interpretation would mean section 61 provides an overlapping or additional means of obtaining compensation over and above any contractual remedies that may be available to the section 61-plaintiff, it would arguably promote the welfare of consumers generally, particularly vulnerable consumers, to facilitate recovery of such loss by means of one action. A counter-argument to this is based on legislative context, namely that remedies for loss resulting from damage to a product due to an unsafe feature, defect or substandard quality are already provided for in section 56 of the CPA. In the interest of legal certainty, it would be preferable for the legislature to clarify this point by expressly stating in section 61(5)(c) whether "physical damage to any property" includes damage to the defective goods themselves.

[1448] Ibid.

- Section 61(6)(c) empowers the court to apportion liability among persons who are found to be jointly and severally liable.[1449] It is argued that this is similar to the court's power to apportion liability among joint wrongdoers in an Aquilian action. See conclusions below at 5.2.7.4 regarding the basis for apportionment.

5.2.6 Concept of defectiveness

- It is argued that the categorisation of different types of product deficiencies in section 53 and 61 of the CPA serves no practical purpose and gives rise to significant legal uncertainty due to overlapping notions employed by these provisions.[1450] The difficulties presented by the various categories of defectiveness in section 53 and 61 are illustrated by the *Halstead-Cleak* cases and the decision of the Consumer Goods and Services Ombud (CGSO) in 2014 regarding a consumer complaint involving personal injury allegedly caused by inadequate warnings on a drain cleaner product.[1451]

- The various definitions of product deficiency in sections 53 and 61 could be replaced with a single definition of "defect", as is done in the EU Directive, the UK and Australia.[1452]

- It is suggested that the 'expectations test' for determining "defect" in section 53(1)(a)(i) and (ii), which is similar to the test employed in the EU Directive and ACL, be abandoned altogether in the CPA due to significant academic criticism of this test's

[1449] 4.2.7.4. See conclusions below at 5.2.7.4.
[1450] 4.2.6.2.
[1451] 4.3.1; 4.3.2. See also 4.2.6.1(i).
[1452] 3.5.6.

circularity and vagueness and potential for readmitting negligence to the enquiry.[1453] This test has been rejected by the majority of courts in the US and replaced with a reasonableness standard involving a risk-utility analysis of a product.[1454]

- It is suggested that South African courts could adopt an objective reasonableness standard for determining defectiveness of goods for purposes of section 61, similar to the wrongfulness enquiry in the common law of delict.[1455] The reasonableness of a product's safety can be assessed with hindsight having regard to all the relevant circumstances, without reintroducing negligence to the enquiry. This would, in essence, involve a 'risk-utility' analysis, which is more consistent with the current wrongfulness approach followed by South African courts.

- The reasonableness test could be supported by a non-exhaustive list of relevant considerations expressly listed in the CPA to provide guidance to courts when assessing defectiveness.[1456] The particular weight attaching to each factor would be at the court's discretion. It is further submitted that South African courts could draw on the vast amount of foreign case law on strict product liability, in addition to existing South African case law on delictual product liability, in identifying factors that may be relevant to determining whether a 'defect' exists in particular goods or categories of goods. However, such foreign case law and the factors considered there must be understood in the context of that unique jurisdiction and may, upon application, achieve a different result in South Africa.

[1453] 4.3.1.
[1454] 3.2.1.6(ii); 3.2.1.6(iii).
[1455] 4.2.6.1(i).
[1456] 4.3.1(i).

- If a single definition of “defect” were to be employed by the CPA, it is suggested that section 61(1) could perhaps read as follows:

'61(1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence - of a defect in the goods,

~~(a) supplying any unsafe goods;~~

~~(b) a product failure, defect or hazard in any goods; or~~

~~(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods;~~

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.'

- It is suggested that the single concept of “defect” for purposes of a section 61 claim could be defined as follows by the CPA:

'(1) For purposes of Part H, goods have a ‘defect' if they are not reasonably safe.

(2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances, including:

(a) the manner in which, and the purposes for which, they have been marketed; and

(b) the standard intended for the product by the producer;

(c) standards or duties prescribed by legislation for the goods;

(b) their packaging; and

(c) the use of any mark in relation to them; and

(d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and

(e) what might reasonably be expected to be done with or in relation to them; and

(f) the time when the goods were manufactured or supplied;

(g) the possible prevention of the harmful effect of the goods by alternative manufacturing process or design;

(h) the risk, benefit, utility and cost of the goods.

(i) the possible prevention of the harmful effect of the goods by alternative manufacturing process or design;'

- From a practical perspective, a single concept of defect would make it easier for section 61-plaintiffs to plead their case and would provide courts with the necessary freedom to develop principles for determining defectiveness that are suitable to the particular type of alleged defect in question, whether manufacturing, design or warning related or in some cases, a combination.

- In the absence of legislative amendment, it is argued that the current test for "defect" employed by section 53(1)(a)(i) and (ii), which refer to what persons generally would be "reasonably" entitled to expect "in the circumstances" could be interpreted so as to mean a reasonableness standard, akin to the wrongfulness enquiry in the law of delict, involving an assessed of defectiveness with hindsight in light of all the relevant circumstances, without reintroducing negligence to the enquiry.

- The plain meaning of the definition of "defect" in section 53(1)(a)(i) clearly includes manufacturing defects. However, the wording in section 53(1)(a) is silent on whether a "design" defect is included. It is argued that the plain meaning of the words "any characteristic" that renders the goods less useful, practicable or safe, as used in section 53(1)(a)(ii) could be construed to include "design characteristics".[1457]

[1457] 4.2.6.1(i).

- In the context of "inadequate warnings or instructions" within the meaning of section 61(1)(c), the role of intermediaries may be relevant.[1458] For instance, the majority of US courts have recognised a so-called 'learned intermediary doctrine' in the context of pharmaceutical products and medical devices, pursuant to which a producer may escape liability where it relied on a learned intermediary, such as a treating doctor, to advise and warn consumers of the risks of a product. The application of this factor in South Africa may arguably be different than in developed coutnries such as the United States, given the high levels of poverty and illiteracy among consumers. This doctrine is based on the presumption that the learned intermediary would explain the risks of a particular product in clear and understandable terms to the consumer. However, there is a real risk in South Africa that consumers may not always fully comprehend instructions or warnings provided verbally to them, whether due to illiteracy or language barriers. Producers in South African arguably owe a higher duty to provide instructions and warnings in clear, plain and simple language and cannot escape liability by complete reliance on learned intermediaries.

- With respect to assessing the adequacy of instructions or warnings accompanying goods within the meaning of section 61(1)(c), it is argued that courts should keep in mind the effects of information overload on consumers' decisionmaking ability, particularly in the context of South African consumers. Behavioural economics suggest that, due to consumers' cognitive capacity limits, a product that contains too many warnings or instructions may be less likely to be read and less effective.

[1458] 4.2.6.1(i).

5.2.7 Defences

5.2.7.1 Compliance with public regulation

- Section 61(4)(a) provides a defence where a defendant can show the product defect was "*wholly attributable to compliance with a public regulation***.**"[1459]

- This defence may not be of much practical use as regulations are generally aimed at making products safer and would rarely force a manufacturer to produce an unsafe product. This is supported by the apparently limited experience of this defence in the EU. In 2011, it was reported that the equivalent of this defence contained in article 7(d) of the EU Directive had rarely been raised in case law.[1460]

- The Australian legislature is of the view that, where a regulation provides a minimum safety standard, and the manufacturer was free to exceed the minimum requirement without sanction, it cannot be argued that compliance with the regulation was the sole cause of the product defect.[1461] It is contended that South African courts are likely to take a similar view when interpreting the defence in S 61(4)(a).

- It is suggested that consideration could be given to providing section 61 plaintiffs with a right of recourse, as is done by the ACL, against the public authority responsible for the regulation where it is established by a section 61-defendant that the product was defective solely due to compliance with that regulation.[1462] However, it is argued that there may well be valid policy reasons for the CPA not holding public authorities strictly

[1459] 4.2.7.1.
[1460] 3.3.1.7(i).
[1461] 3.4.1.7(i).
[1462] Ibid.

liable in these circumstances. For instance, the view may be that public authorities should not be strictly liable for issuing product safety standards that do not provide the safest and most comprehensive information available, based on scientific knowledge at the time, given the financial restrictions within which these authorities operate. This policy argument would be particularly relevant in the context of a developing country such as South Africa. Further, an allocation of risk argument may dictate that, despite public safety regulations, it is those parties who put into circulation products for profit who should bear the primary and ultimate responsibility for ensuring their safety.

5.2.7.2 Absence of defect at time of supply

- Section 61(4)(b)(i) provides a defence if the defendant can show the product defect did not exist in the goods at the time it was supplied by that defendant to another defendant.[1463]

- This defence is of particular importance to suppliers of component goods who can establish that the component was not defective at the time it was supplied to the manufacturer of the final defective good.[1464]

- The defence provided by section 61(4)(b)(i) is similar to the Australian and European approach.[1465] While the US Restatement does not provide for a defence in similar wording, it provides a defence in the context of design and warning defects where the consumer or user misuses, modifies or alters the product.[1466]

[1463] 4.2.7.2.
[1464] 4.4.2.
[1465] 3.5.7(ii).
[1466] Ibid.

- It is unclear from the wording of section 61(4)(b)(i) what level of proof a defendant supplier would have to meet in order to succeed with this defence.[1467] In the absence of any legislative clarification in this regard, the onus would arguably rest with defendant to establish, on a balance of probabilities, that the defect did not exist at it time it left that defendant's possession or control. Presumably, if the defendant can adduce sufficient evidence regarding its quality control measures to justify a *prima facie* case that the defect arose after leaving the defendant's possession or control, the onus would then shift to the plaintiff to rebut this. It is doubtful whether a South African court would allow the defence to succeed where the defendant cannot provide proof of inspection of the particular product that allegedly caused harm, as done by the English Court of Appeal in *Terence Piper v JRI (Manufacturing) Limited.*[1468] In the interest of assisting vulnerable consumers in the particular context of South Africa who are often unable to produce the same level of expert evidence as sophisticated manufacturers at trial, South African courts may be inclined to require stricter proof from the defendant as to the absence of a defect in the particular product for purposes of sction 61(4)(b)(i).

- Section 61(4)(b)(ii) provides a defence to a defendant if the defect was wholly attributable to compliance with instructions provided by the person who supplied the good to the defendant.[1469] This defence would assist a supplier who has no expert knowledge of a product acquired from another supplier and simply followed the instructions of that other supplier, for instance, relating to care or storage of that product, resulting in a defect. This defence was arguably introduced as recognition of the reality that retailers are often unfamiliar with the technicalities of certain products

[1467] 4.2.7.2.
[1468] [2006] 92 BMLR 141, discussed at 3.3.1.8(i) aboce.
[1469] 4.4.2.

and that they should not be held strictly liable for merely following the instructions provided to them by their supplier. In reality, the party providing instructions with a product would in the majority of cases be the producer of that product or, at least, a supplier with more sophisticated knowledge of the product than subsequent suppliers. Section 61(4)(b)(ii) therefore seems to allocate the risk of liability to that party with more sophisticated knowledge of the product as opposed to generalist and/or small, unsophisticated retailers. This defence therefore seems to strike a fair balance between the interests of parties in the supply chain thereby promoting a "fair" and "sustainable" marketplace pursuant to the legislative purposes of the CPA.

5.2.7.3 Defect not reasonably discoverable

- Section 61(4)(c) provides a defence where a defect was not reasonably discoverable by the distributor or retailer, having regard to that person's role in marketing the goods to consumers.[1470] The circumstances where this defence could be raised may include so-called 'development risks', being risks that are only discovered as the goods are being used by consumers and which were not known or detectable at the time of supply.

- On the face of it, section 61(4)(c) appears to be available to distributors and retailers of defective goods only, and not manufacturers or importers. However, it is questioned whether this was a legislative oversight given that section 61(4) refers at the outset to the liability of a "particular person". This creates ambiguity which arguably warrants a purposive interpretation. It was perhaps the legislature's intention to provide this defence to retailers since they often do not have the opportunity to inspect products prior to on-sale, such as sealed products that would become unmarketable once

[1470] 4.2.7.3.

opened, nor do they necessarily possess the knowledge or skill to detect defects. This would appear to strike a fair balance between the liability of suppliers in the distribution chain where the producer was closer to the product and had the opportunity to conduct proper quality controls prior to packaging. The omission of "importers" from this defence presumably serves to prevent a situation where a plaintiff has no recourse against the retailer and distributor based on this defence and the producer is overseas. In this scenario, fairness would perhaps dictate that the importer of the harmful product into South Africa should bear liability towards the plaintiff, regardless of whether that importer could reasonably have detected the defect, in other words true strict liability. In light of these policy considerations, it is is argued that the defence in section 61(4)(c) should not be available to producers and importers.

- There is widespread academic criticism of the equivalent of this defence in foreign jurisdictions.[1471] It is argued that, by allowing the producer or supplier to escape liability on the ground that it acted reasonably, in effect amounts to re-admittance of negligence or fault-based liability.

- Given the policy reasons for introducing strict product liability under the CPA, some authors argue that the reasonableness test for purposes of this defence should be a '*high, although not unattainable standard of reasonableness',* akin to the reasonableness standard under the element of wrongfulness in the law of delict, taking into account the *'highest level of good practice in the relevant industry".*[1472] This view is

[1471] 3.3.1.7(iii); 4.2.7.3.
[1472] 4.2.7.3.

supported in light of the theoretical criticism of this defence in the context of a strict liability regime.[1473]

- The reasonableness test imposed by this defence would arguably require courts to take into consideration the '*state of scientific and technical knowledge at the time the good was under the control of that person'*, despite the fact that this phrase was removed from the final wording of section 61(4)(c).[1474] If South African courts were inclined to consider the "scientific knowledge and technical knowledge" as a relevant factor, they would have to consider this in the particular context of distributors and retailers in South Africa and the knowledge reasonably available and accessible to them or that they could reasonably be expected to possess. It is unlikely that courts would expect general distributors and retailers to be aware of the most advanced and latest scientific and technical knowledge reasonably accessible to enable detection of a defect, rather general knowledge that such suppliers could reasonably be expected to possess having regard to their role in marketing the goods. It could perhaps also be relevant to consider whether a retailer is provided with any training or education by a producer regarding the product prior to being able to sell it.

- The reference in section 61(4)(c) to retailers and distributors' "*role in marketing the goods to consumers*" would arguably require courts to consider, for instance, whether they had the opportunity to open packaging and inspect the goods.[1475] There are numerous consumer goods that are packaged and sealed in such a way that distributors and retailers are unable to inspect those products for defects prior to on-sale without rendering them unmarketable. Even if intermediate inspection by these

[1473] 4.2.7.3.
[1474] Ibid.
[1475] 4.2.7.3.

suppliers is possible, it would hardly be practically and economically feasible to require distributors and retailers to do so for every single product they supply. Therefore, the question may be what level of sampling for quality control purposes would be reasonable to expect of a distributor or retailer. There are also products which are of a highly technical or complex nature which means distributors or retailers could not be expected to psosess the knowledge or skill to conduct testing. The question may then become whether they are reasonably expected to outsource to independent testing. As this illustrates, the reasonableness standard would require a balancing of the interests of distributors and retailers and the protection of consumers, having regard to the particular circumstances, such as the nature of the product and the parties involved.

- It is unclear what practical impact this defence will have in South Africa or to what extent it will 'weaken' the strictness of section 61 liability.[1476] It is noteworthy that, since the introduction of this defence in Australia in 1992, it has only been considered twice in reported case law.[1477] Further, by 2002, the practical application of this defence under the EU Directive was still extremely limited in reported case law despite being available for 17 years.[1478] In 2011 a report by the European Commission on the application of the EU Directive noted that stakeholder have differing opinions regarding the effectiveness of this defence, but recognise that the EU Directive overall strikes an appropriate balance between the competing interests of industry and consumers. The report noted that stakeholders considered the defence important to maintain an appropriate balance between producers and persons harmed by defective products. However, removal of the defence in two EU states was reported to have had a limited economic impact. Of course, the fact that the defence has not been applied much in EU case law does not

[1476] 4.2.7.3.
[1477] 3.4.1.7(iii).
[1478] 3.2.1.7(iii).

mean that it has not been raised frequently and successfully in out of court negotiations and settlements.

5.2.7.4 Apportionment of liability

- Section 61(6)(c) provides for apportionment of liability among defendants who are jointly and severally liable.[1479] This provision does not provide any guidance as to the basis for apportionment. It is unclear whether section 61-liability constitutes a 'debt' for purposes of the *Apportionment of Damages Act* 34 of 1954.

- Section 61 does not provide for apportionment in respect of the plaintiff-defendant relationship, contrary to the EU Directive, the UKCPA and the ACL.[1480] It is argued that this appears to be a legislative oversight.[1481] It is argued that the CPA's purpose of establishing a legal framework for a "fair" and "sustainable" consumer market would dictate that section 61 liabilities should take note of the actions of a plaintiff who recklessly ignores safety warnings or instructions or misuses goods, thereby contributing to their harm and that the defendant's liability be reduced accordingly. If suppliers are held liable for a plaintiff's conduct that contributed to the harm, it would drive suppliers out of the market and reduce consumer access to goods, which would not promote the welfare of consumers generally. However, it is doubtful that courts would stray from the plain meaning of section 61(6)(c) to read it as including apportionment of liability between defendants and the plaintiff. It is argued that, in light of the prevailing position in the foreign jurisdictions considered and in the interest of estabslihing a legal framework for a consumer market that is "fair" and "sustainable",

[1479] 4.2.7.4.
[1480] 3.5.7(iv).
[1481] 4.2.7.4.

section 61 ought to allow for apportionment of liability having regard to both the plaintiff and defendant(s) contribution to the causation of harm. It is argued that this omission should be rectified by the legislature.[1482]

- A solution to the theoretical problem of applying apportionment in a strict liability claim is to assess apportionment on the basis of comparative causation, rather than comparative fault.[1483] In other words, courts would need to objectively assess to what degree the harm was caused by the product defect, the actions of the plaintiff and the actions of the defendant(s). Another solution would be to follow the approach in the UKCPA by expressly stating in Section 61 that the *Apportionment of Damages Act* applies and that the "defect", "hazard", "failure" or "unsafe" characterstic of the goods that caused harm is deemed to be the "fault" of the section 61 defendant(s).[1484]

- In the interest of removing any legal uncertainty regarding the basis for apportionment and whether apportionment applies with respect to the plaintiff's contribution to the harm, it is suggested that the CPA expressly prescribe rules for apportionment or alternatively, expressly state that the established rules under the *Apportionment of Damages Act* 34 of 1954 apply to section 61 claims.

5.2.7.5 Prescription

- Section 61(4) appears to provide for a three year prescription period in respect of section 61 claims, however, it does not use the established terminology contained in the

[1482] Ibid.
[1483] 4.2.4; 4.2.7.4.
[1484] 4.2.7.4; 3.3.1.8(i).

Prescription Act 68 of 1969.[1485] It is, therefore, unclear whether, and to what extent, the prescription provisions under the CPA are intended to co-exist with the *Prescription Act*. Section 61(4)(d) gives rise to numerous interpretive problems and uncertainties relating, for instance, to the calculation of the time limit, interruption and delay of the running of time and aspects which may indicate inconsistencies between this provision and the Prescription Act.

- It is suggested by some authors that section 61(4)(d) could be interpreted so as to mean that prescription for purposes of section 61-liability is governed by the established principles of the *Prescription Act*.[1486] Alternatively, if such an interpretation is not permitted based on the rules of statutory interpretation, it is suggested that the legislature amend section 61(4)(d) to confirm section 61 liability constitutes a 'debt' for purposes of the *Prescription Act* or alternatively, provide detailed prescription rules for section 61.

- The CPA does not impose a so-called 'long-stop' provision such as employed by the ACL and the EU Directive, which provides that a product liability claim cannot be brought more than 10 years after the supply of the good by the manufacturer.[1487] It is contended that the reason for this long-stop limitation presumably relates to concerns over procedural fairness and evidentiary difficulties. A manufacturer is unlikely to have retained detailed production or quality control records relating to a product supplied more than 10 years ago. Further, the product may have been subject to considerable use, wear and tear and changed ownership multiple times. It is unclear whether omission of a long-stop limitation period from the CPA was a legislative oversight or

[1485] 4.2.7.5.
[1486] Ibid.
[1487] 4.2.7.5; 3.5.7(v).

intentional. No reference is made to such a provision in the draft Consumer Protection Bill. In the interest of establishing a legal framework for a consumer market that is "fair", procedural fairness and in light of the prevailing practice in the foreign jurisdictions considered, it is recommended that the legislature give consideration to providing for a 'long-stop' prescription period in the CPA for purposes of section 61-claims.

5.2.7.6 Contractual restriction of liability

- The CPA does not expressly prohibit exemption clauses in respect of damages claims for loss caused by defects in the goods of which the retailer could not reasonably have been aware, and possibly, pure economic loss caused by defective goods,[1488] provided such loss did not arise as a result of the supplier's gross negligence.[1489] Such exemption clauses would have to comply with the formal requirements in section 49 and may be voided for being "unfair" pursuant to section 48. Further, such exemption clauses would have to comply with the formal requirements in section 49 and may be voided for being unfair pursuant to section 48. Further, an exemption clause in respect of liability for breach of contract which is not prohibited will be presumed to be unfair for purposes of section 48 given the grey listing of such clauses in regulation 44(3)(b). An example would be a term providing that a supplier is not responsible for the economic interests of a consumer, thereby purporting to exclude liability for any pure economic loss sustained by the consumer.

- With respect to liability for death and personal injury, it is argued by Naudé that the grey listing of exemption clauses for such harm "*precludes any conceivable argument that*

[1488] The wording of section 61(5) creates uncertainty as to whether pure economic loss is recoverable under section 61.
[1489] 4.2.7.6.

section 49(2)(c) permits such exemption clauses and that that provision protects them from a fairness review provided they comply with the formal requirements of that provision." [1490] She argues that section 49(2)(c) provides a minimum threshold which any provision relating to such risks must comply with, but exemption clauses relating to bodily injury or death are likely to be unfair, regardless of whether they are initialled or signed.

- In light of the grey-listing of contractual exemptions for personal injury and death arising from defective goods, the pre-CPA case law regarding the validity of such clauses, the constitutional rights of the consumer to life and bodily integrity, coupled with the underlying purpose of the CPA to advance the welfare of consumers generally, it is unlikely a court will uphold exemption clauses that attempt to limit the supply chain's liability to the plaintiff under section 61 for bodily harm or death caused by defective products.

- Regulation 44 does not expressly grey list a term which purports to exclude or restrict the supply chain's liability for harm other than personal injury or death.[1491] However, regulation 44(3)(b) does provide that a term is presumed unfair if it "*has the purpose or effect of excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement."* According to Naudé, this means all exemption clauses which are not void for purporting to deprive the consumer of his or her rights under the CPA are presumed to be unfair.[1492] It is argued that an example of

[1490] Ibid.
[1491] Ibid.
[1492] *Reg 44* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 44-17.

an exemption clause which will be void for purporting to exempt the seller from liability under the CPA is a clause "*purporting to deprive the buyer of the right to claim damages under section 61 for bodily injury, death or damage caused to property and resultant economic loss caused by defective goods, insofar as the defences provided for in section 61(4) are not available to the supplier.*"[1493]

- It is submitted that courts are likely to interpret the CPA so as to prohibit exemption clauses in respect of the supply chain's liability to the plaintiff for pure economic loss on the basis that the wording of section 61(5) is broad enough to include pure economic loss. Section 61(5)'s only reference to "economic loss" relates to economic loss that results from death, injury or illness or damage to property and does not expressly include "pure economic loss". However, section 61(5) does not prescribe a *numerus clausus* of types of harm that may be recoverable and is broad enough, on the plain meaning of the wording, to include pure economic loss. Accordingly, allowing exemption clauses for pure economic loss would effectively amount to depriving consumers of a right under the CPA.

- It is argued that section 5(5) may extend section 61 liability to the transactions between the parties in the supply chain. For instance, a section 61 claim may potentially be brought by a retailer against a producer relating to the defective goods, loss of profit and to recover compensation for any claims brought against the retailer by the consumer. It is questioned whether this extended section 61 liability could be excluded contractually by parties in the supply chain *inter se*. De Stadler offers a number of arguments in this

[1493] 44-18.

regard.[1494] Firstly, she contends that, where the transaction is not exempt from the CPA's application, section 51 would prohibit the parties from excluding any liability under the CPA. The counter argument to this is that section 51 expressly refers to "transaction or agreement". It follows that, if a transaction is exempt from application of the CPA, it is difficult to see how section 51 would apply to it. De Stadler further argues that, even if section 51 is not applicable to exempted transactions, it is arguable that section 61 in itself prevents exclusion of the liability imposed by it. She bases this argument on the common law requirement of lawfulness for validity of contracts. If a contractual agreement is in direct contradiction to an express or implied prohibition on excluding section 61 liability, there is a presumption that it is void *ab initio*.[1495]

- Alternatively, it is suggested by De Stadler that section 61 perhaps implies that its liability cannot be excluded, even in cases where section 51 does not apply to a transaction. It is at least arguable that a purpose interpretation of section 61 would not prevent exclusion of its liability in cases where transactions are exempt from application of the CPA, such as transactions involving consumers who are large juristic persons or the State. The basis for this is that the CPA's purpose focuses on the protection of vulnerable consumers, not sophisticated persons with stronger bargaining power. On the other hand, section 5(5) appears to protect the right of retailers to recover losses due to defective goods from distributors, and the right of distributors to recover losses against the producer or importer. It is argued that it would be an unjust position if the retailer did not have a recourse against any party higher in the supply chain who had the most control over the product's safety and quality. This argument of De Stadler is supported in light of the legislative purpose of the CPA to establish a legal framework

[1494] *Section 5* in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 5-41 to 5-42.
[1495] Ibid.

for a consumer market that is “fair” and “sustainable” and that strikes a fair balance between the parties in the supply chain.

- There seems to be general consensus among the foreign jurisdictions considered that contractual clauses that have the effect of restricting or excluding the liability of suppliers of defective products, vis-à-vis the plaintiff, are prohibited or void.[1496] There also appears to be consensus that suppliers are generally free in these jurisdictions to contractually agree among themselves who would bear strict product liability in the event that a defective product causes harm.[1497]

- It is argued that any contractual clause that has the effect of restricting or excluding the liability of the supply chain vis-à-vis the section 61 plaintiff for any type of harm envisaged in section 61(5), including pure economic loss, would be void for purporting to deprive a consumer of a right under the CPA.[1498] This would be consistent with the prevailing position in the foreign jurisdictions considered and more importantly, the underlying purpose of the CPA to protect vulnerable consumers who are generally in a much weaker bargaining position in respect of the terms of supply of consumer goods. As noted by the drafters of the US Restatement (Third), there is a presumption that the ordinary consumer lacks adequate information and bargaining power to agree to a fair contractual limitation of rights clause in a contract of sale.[1499]

[1496] 3.5.7(vi).
[1497] Ibid.
[1498] 4.2.7.6.
[1499] 3.2.1.7(vi).

- In the interest of legal certainty for both consumers and industry, it is suggested that the legislature expressly state the position regarding validity of contractual exemption clauses for strict product liability under section 61 in the CPA.

5.3 IMPACT OF WIDER LIABILITY

- To date, there are only two reported judgments regarding the application of section 61, being the High Court and Supreme Court of Appeal decisions in the *Halstead-Cleak cases*.[1500] These judgments highlight the difficulties presented by the numerous definitions of product defectiveness in sections 61 and 53. Unfortunately, the judgment do not provide any clarification as to the difference between the two concepts of "defect" employed by section 53(1)(a). The difficulties presented by the various definitions of product defectiveness in section 61 and 53 are also highlighted by decisions of the Consumer Goods and Services Ombud.[1501]

- While case law regarding section 61 remains very limited, it is likely that this statutory remedy has been raised as a matter of course in most product liability claims since its introduction. Administrative or semi-judicial handling of section 61 complaints, by bodies such as the Consumer Goods and Services Ombud and other industry ombud schemes, will play a key role in providing consumer redress in South Africa. This is due to section 69(d) which provides that a plaintiff may only approach a civil court (other than a consumer court) "*if all other remedies available to that person in terms of national legislation have been exhausted*." This provision creates legal uncertainty and practical problems for section 61 claimants in that is unclear whether the provision means claimants must literally exhaust "all other remedies" under national legislation which

[1500] Discussed above at 4.3.2.
[1501] 4.3.1.

would be very onerous, particularly on vulnerable, impecunious and unsophisticated claimants and would significantly restrict access to civil courts. It is suggested that this aspect of section 69(d) be clarified by the legislature. The key role to be played by administrative or semi-judicial bodies in relation to section 61 claims is evidenced by the rapidly increasing number of reported consumer complaints received by this national ombud scheme.[1502]

- It is likely that section 61 will impact on the basis on which insurance is offered to producers, importers, distributors and retailers in South Africa with respect to conditions for coverage and premiums, similar to the European experience.[1503] In light of the extended scope of liability under section 61, is suggested that South African suppliers review their existing insurance coverage and consider obtaining separate product liability insurance.

5.4 FINAL REMARKS

- The introduction of strict product liability in South Africa has undoubtedly been a significant step in the right direction in aligning South African consumer law with that of its international trading partners. The risk of strict liability for placing harmful products into circulation in South Africa will inevitably have a positive impact on the consumer market by prompting higher levels of product safety, whether through testing, quality control or clearer instructions or warnings.

- It is argued that courts and other consumer redress bodies will seek to continue to balance the interests of consumer protection and industry development and innovation

[1502] Ibid.
[1503] Ibid.

in order to develop and achieve a legal framework that is fair, efficient, and sustainable and which promotes the welfare of consumers generally. As argued in this study, the test for the key concept of defectiveness of goods is likely to be applied by following a reasonableness test akin to the wrongfulness element at common law, which would play an important normative and limiting role in determining whether causation of harm should give rise to strict liability under section 61 of the CPA.

- Regrettably, the strict product liability provisions of the CPA, as currently worded, give rise to legal uncertainty in numerous respects, as outlined in this study. In the interest of providing legal certainty to consumers, businesses and other industry stakeholders as to the extent of protection afforded by, and liability imposed by section 61, it is suggested that various aspects of the CPA's product liability framework be addressed through legislative review and amendment or through a purposive interpretation of the provisions, in so far as this is permitted by the principles of statutory interpretation, having regard to the legislative purposes and policyunderpinning the CPA and having regard, where appropriate, to the experience of foreign strict product liability regimes.

- Based on the comparative analysis conducted in this study of the various CPA provisions relevant to section 61 liability and the experience of the Consumer Goods and Services Ombud in handling section 61 claims to date, it is contended that section 61 is likely to increase the number of product liability claims against producers, importers, distributors and retailers due to the extended scope of liability; and that the new judicial, semi-judicial and administrative bodies created under the CPA will deal with the vast majority of section 61 claims. However, it is the duty of the courts and the

legislature to provide these bodies with clearer guidelines on the interpretation of section 61.

LEGISLATION

South Africa

1. *Agricultural Product Standards Act* 119 of 1990.
2. *Apportionment of Damages Act* 34 of 1954.
3. *Electricity Regulation Act* 4 of 2006.
4. *Electronic Communications and Transactions Act* 25 of 2002.
5. *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947.
6. *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972.
7. *Liquor Act* 59 of 2003.
8. *Liquor Products Act* 60 of 1989.
9. *Meat Safety Act* 40 of 2000.
10. *Medicines and Related Substances Act* 101 of 1965.
11. *National Health Act* 61 of 1947.
12. *Regulations Relating to the Labelling and Advertising of Foodstuffs* 146 GN 32975 of 1 March 2010.
13. *The Apportionment of Damages Act* 34 of 1956.
14. *The National Credit Act* 34 of 2005.

Australia

1. *Civil Aviation Regulations* 1988 (Cth).
2. *Competition and Consumer Act* 2010 (Cth); Schedule 2: Australian Consumer Law.
3. *Trade Practices Act* 1974 (Cth).

United States

1. Colorado Rev. Stat. s13-21-403(1)(a)(1987).
2. Kentucky Rev.Stat. s411.310(2) (Banks-Baldwin 1978).
3. L.a. Rev. Stat. Ann. s9:2800.55 (West 1988).
4. Mo. Ann. Stat. s537.764 (West 1987).
5. N.C. Gen. Stat. s99B-6 (1995).
6. N.J. Rev.Stat. s 2A:58c-3b.(1)-(3).
7. N.J. Stat.Ann. s 2A: 58C-3(1) (West 1987).
8. Restatement of the Law (Second) of Torts 1977 (The American Law Institute).
9. Restatement of the Law (Third) of Torts 1998 (The American Law Institute).
10. Ind.Code Ann. ss 33-1-1.5-2.5 (West 1994).
11. Indiana Code s33-1-1.5-4(b)(4) (1988); Iowa Code Ann.s668.12 (West 1987).
12. Miss. Code Ann. s11-1-63(1993).
13. Preliminary Draft No. 1 (April 20, 1993) Restatement (Third) of Torts: Products Liability, 2 Am.L.Prod.Liab. s 28:14.
14. Ill. Comp. Stat.Ann. s5/2-2104 (West 1993 & Supp.1996).
15. New Jersey Rev.Stat.s2:58c-3a.(1)(1987).

European Union

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